(26,580)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 494.

THE OKLAHOMA OPERATING COMPANY, APPELLANT,

vs.

J. E. LOVE, W. D. HUMPHREY AND CAMPBELL RUSSELL, COMPOSING THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

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1 In the District Court of the United States for the Western District of the State of Oklahoma.

In Equity. No. 273.

THE OKLAHOMA OPERATING COMPANY, a Corporation, Plaintiff,

vs.

J. E. LOVE, W. D. HUMPHREY, and CAMPBELL RUSSELL, Composing the Corporation Commission of the State of Oklahoma, Defendants.

Citation.

To J. E. Love, W. D. Humphrey, and Campbell Russell, Composing the Corporation Commission of the State of Oklahoma, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington in the District of Columbia on the 20 day of June, 1918, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the District Court of the United States for the Western District of Oklahoma from an interlocutory decree denying motion for temporary injunction signed, filed and entered on the 18 day of May, 1918, in that certain suit being In Equity Number 273, wherein The Oklahoma Operating Company, a corporation, is plaintiff, and you as defendants and appellees, to show cause, if any there be, why the decree rendered against the said appellant as in said order allowing appeal mentioned should not be correct, and why justice should not be done to the parties in that behalf.

Witness the Honorable John H. Cotteral, United States District Judge for the Western District of Oklahoma, this 21st day of May, 1918.

JOHN H. COTTERAL,
United States District Judge for the Western District of Oklahoma.

Service of the above citation accepted this 22 day of May, 1918.

S. P. FREELING,
Attorney General;
JNO. B. HARRISON,
Ass't Att'y Gen.,
By HUNTER S. JOHNSON,
Ass't Att'y Gen.

2 [Endorsed:] In Equity. No. 273. In the District Court of the United States for the Western District of the State of Oklahoma. The Oklahoma Operating Company, a corporation, Plaintiff, vs. J. E. Love, et al., Defendants. Citation. Filed May 22, 1918.

Arnold C. Dolde, Clerk, by Frank T. McCoy, Deputy. Ames, Chambers, Lowe & Richardson, Attorneys and Counselors at Law, Oklahoma City, Okla.

3 In the District Court of the United States for the Western District of Oklahoma.

In Equity. No. 273.

THE OKLAHOMA OPERATING COMPANY, a Corporation, Plaintiff,

vs.

J. E. LOVE, W. D. HUMPHREY, and CAMPBELL RUSSELL, Defendants.

Bill of Complaint.

Comes the plaintiff in the above entitled cause and for its cause of action against the defendants alleges:

That the plaintiff is a corporation organized under the laws of Oklahoma having its principal place of business in the city of Oklahoma City, and that it is a resident and citizen of the Western District of the State of Oklahoma. That the defendants J. E. Love, W. D. Humphrey and Campbell Russell are all residents and citizens of the State of Oklahoma; that said J. E. Love being a resident and citizen of the Western District of said State, and the said W. D. Humphrey and Campbell Russell being residents and citizens of the Eastern District of said State and that said defendants are the duly elected, qualified and acting members of the Corporation Commission of the State of Oklahoma.

That the matter in controversy in this cause, exclusive of interest and costs exceeds $3,000.

That the plaintiff is engaged in the laundry business in Oklahoma City, Oklahoma, and operates four laundries, known as King's Laundry, the White Swan Laundry, the Palace Laundry and The New State Laundry, all of which are commonly known as steam laundries. That there are in the city of Oklahoma City three steam laundries not owned by or connected with this plaintiff. That this plaintiff does approximately four-sevenths of the laundry business of the city of Oklahoma City, which is done by steam laundries, but that it

4 does less than twenty per cent of the total laundry business of said city. That on April 5, 1913, the Corporation Commission of the State of Oklahoma made an order adjudging that this plaintiff was guilty of a violation of the anti-trust laws of the State of Oklahoma, and adjudging that the commission had jurisdiction over the prices and practices of this plaintiff under section 8235 of the Revised Laws of 1910 (Sec. 8812 Snyder's Compiled Laws). The Commission however held:

"No order is regarded by the Commission as necessary except such as will require application and proper showing for any proposed increase in prices, before such increases are made and an order will issue accordingly.

"It is therefore ordered that the defendant, the Oklahoma Operating Company, do not increase its prices over those now charged for any class of service without having first made application to and secured the permission of the Commission therefor."

A copy of said order is hereunto attached, marked "Exhibit A" and referred to as a part of this bill of complaint.

At the time said order was made there was no method under the laws of Oklahoma by which the same could be reviewed in any of the courts of the State, there being no appeal allowed to the Supreme Court from that order, and the district courts and all other courts of the state being prohibited from interfering with the orders of the Corporation Commission. In addition to the fact that there was no method of reviewing said order in the courts of the state the effect of said order was merely to affirm the schedule of prices then in effect by the plaintiff, and as it then had no intention of increasing the prices, the said order had no practical effect upon the business of the plaintiff, and therefore resort to this court was then unimportant.

Between the time said order was made however and the present time the prices of substantially all of the commodities needed by the plaintiff in the prosecution of its business have advanced from 50% to 300% as is shown by the following schedule, showing in part the advances in prices under which this plaintiff is now operating:

5

	1913.	1918.
"Soap per pound	6⅛	17½
Acetic Acid per pound	.04	.12
Soda Ash per hundred	1.17	4.00
Starch (Corn) per hundred	3.80	7.44
Starch (Wheat) per hundred	6.75	9.63
Hydrated Lime per ton	11.80	20.00
Bluing per pound	3.75	15.00
Wrapping Paper per hundred	3.65	7.40
Cotton Twine per pound	.18	.58
Cotton Duck per yard	.27	.70
Canvas per yard	1.08	2.35
Cotton Padding per pound	1.60	2.85
Laundry Lists per thousand	.50	.75
Hay per ton	8.00	25.00
Bran per hundred	.90	2.25
Chops per hundred	1.50	3.45"

On account of the heavy increase in the cost of operating, it has become necessary for this plaintiff to increase its prices and in the month of January, 1918, it filed a motion before the Corporation Commission of the State of Oklahoma praying that defendant's order made in April, 1913, be set aside on the ground that this plaintiff is not a monopoly; that the laundry business if not one to which the anti-trust laws of the state apply and that section 8235 of the Revised Laws of 1910 is in violation of the Constitution of the United States.

A copy of this motion is hereunto attached, marked "Exhibit B" and referred to as a part of this bill of complaint.

On March 5, 1918, the Commission made an order overruling said

motion, a copy of which is hereunto attached, marked "Exhibit C" and referred to as a part of this bill of complaint.

6 This plaintiff respectfully shows to the court that it cannot resort to the courts of the State of Oklahoma to review either of said orders. That said orders are in fact as it believes unlawful, but that the law provides no method by which the question of their legality can be submitted to the Courts of the State of Oklahoma. That the defendants acting as the Corporation Commission of the State of Oklahoma continue to exercise jurisdiction over this plaintiff under the orders aforesaid pursuant to the provisions of section 8235 of the Revised Laws of 1910, and this plaintiff avers that said section is in violation of the Fourteenth Amendment to the Constitution of the United States in that it deprives this plaintiff of its property without due process of law, and denies to it the equal protection of the laws. Said section 8235 is as follows:

"Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence or to affect the community at large as to supply, demand or price or rate thereof, or said business is conducted in violation of the first section of this article, said business is a public business, and subject to be controlled by the State, by the corporation commission or by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render its services and offer its commodities, or either, upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business."

Said section prescribed no procedure, requires no notice and authorized no appeal. No other provision of the statutes of the state prescribes procedure, requires notice or provides an appeal from any order made in accordance with this section. The plaintiff therefore is bound to obey this order of the commission or suffer the penalties of contempt. Under section 19 of article 9 of the Constitution and section 1192 of the Revised laws of 1910 the commission may punish by imposing a fine for contempt of not to exceed $500 per day.

7 This plaintiff therefore, without being given a resort to the courts to determine the reasonableness of its prices or the existence of a monopoly is prohibited from increasing its prices under a penalty of $500. per day.

This plaintiff further respectfully shows to the court that it has established a new schedule of prices somewhat higher than that authorized under the aforesaid orders of the Corporation Commission, and that said schedule of prices has been published to take effect on the 8 day of April, 1918, and that upon inaugurating said schedule of prices complaints will be filed before the Corporation Commission of the State of Oklahoma showing a violation by this plaintiff of the order of the Commission and asking that it be adjudged in contempt by the Commission, and that the said defendants sitting as the Cor-

poration Commission of said state will adjudge this plaintiff in contempt and will subject it to a fine of not exceeding $500 per day.

This plaintiff therefore says that the said section 8235 of the Revised Laws is in conflict with the Fourteenth Amendment as aforesaid because it prescribes no method of procedure, because it requires no notice to be given by the Commission and because the effect of it is to deprive this plaintiff of all resort to the courts to test the reasonableness of any order made in accordance with said section, and therefore to deny to it the equal protection of the laws and to take from it its property without due process of law, and that there is no adequate remedy except by a writ of injunction.

Wherefore plaintiff prays for a temporary injunction restraining the defendants from entertaining complaints against the plaintiff for the violation of said orders of the Corporation Commission, from issuing any citation to the plaintiff to show cause why it should
8 not be punished for a violation of said order and from doing any other acts or things to enforce said orders, and plaintiff further prays upon final hearing said temporary injunction may be made permanent.

C. B. AMES,
Attorney for Plaintiff.

AMES, CHAMBERS, LOWE & RICHARDSON,
Of Counsel.

STATE OF OKLAHOMA,
Oklahoma County, ss:

Before the undersigned, a Notary Public in and for said county personally appeared Ben Barnett who being duly sworn says that he is the president of Oklahoma Operating Company, the above named plaintiff, that he has read the foregoing bill of complaint and that the facts therein stated and the averments therein contained are true, except as to averments of law, and as to them he believes them to be true.

BEN BARNETT.

Subscribed and sworn to before me this 2nd day of April, 1918.

[SEAL.] EMMA SEBERGER,
Notary Public.

My Commission expires Jan. 12, 1921.

9 EXHIBIT "A."

Corporation Commission of Oklahoma.

Order No. 685.

Cause No. 1633, Proposed Order No. 115.

In re Proposed Order to OKLAHOMA OPERATING COMPANY, a Corporation; King's Laundry, a Co-partnership; White Swan Laundry Company, a Corporation; Palace Laundry Company, a Corporation; New State Laundry Company, a Corporation.

To show cause why said defendants should not be declared a combination in restraint of trade and subject to regulation as to their prices, practices and methods of business.

Appearances:
For the State: E. C. Patton.
For the Defendants: W. F. Wilson.

Opinion and Order by the Commission.

Upon presentation of a number of verbal personal complaints to the effect that many of the laundries of Oklahoma City had consolidated under a single management and control, and had increased prices for their services over the prices formerly charged by some of the laundries included in the merger, the Commission by its Proposed Order No. 115 ordered an investigation directing such order to the Oklahoma Operating Company, a corporation; King's Laundry, a co-partnership; The White Swan Laundry Company, a Corporation; The Palace Laundry Company, a corporation; and The New State Laundry Company, a corporation, all of Oklahoma City, Oklahoma, commanding them and each of them to appear before the Commission and show cause why an order should not issue declaring their acts in violation of Article 1, Chapter 113, Laws 1908-9, and under the provisions of Section 8812, Snyder's Compiled Laws, a combination in restraint of trade, or a monopoly and a quasi-public business, subject to regulation by the Commission as to their prices, practices and services.

Section 8812, Snyder's Compiled Laws, under which the proposed Order was issued and the investigation made by the Commission, provides as follows:

10 "Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold herein are offered or taken by purchase or sale in such a manner as to make it of public consequence, or to affect the community at large as to supply, demand, or price or rate thereof, or said business is conducted in violation of the first section of this Act, said business is a public

business, and subject to be controlled by the State by the Corporation Commission or by an action in any District Court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm, or corporation engaged in any public business to render its services and offer its commodities or either upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business."

Answer was filed by the defendants, denying the jurisdiction of the Commission and contending that the laundry business was not in its nature or of such a character as was subject to monop-ly, or in which there could be a combination in restraint of trade or otherwise an illegal combination.

At the hearing of evidence by the Commission pursuant to the Proposed Order, it was shown that the Oklahoma Operating Company was formed for the purpose of taking over a number of the laundries of the city with an authorized capitalization of $150,000.00; that at this time respondent, the Oklahoma Operating Company, has in operation four laundry plants: King's Laundry at #428 West Washington, the Palace Laundry at 126 West First, The White Swan Laundry at 521 West Second, and the New State Laundry at 120 North Francis; that the Oklahoma Operating Company acquired all these plants by purchase, paying the stockholders of each for their stock in the respective laundry companies with certificates of its own stock; that in addition to the four laundries operated under the consolidation, the Oklahoma Operating Company took over the plants, businesses and good will of Vail and Vail, the Crystal Steam Laundry, the Model Laundry, the Acme Laundry, and that all except the four whose plants are now operated by the Oklahoma Operating Company were closed down and since the consolidation under the organization of that corporation have not been in operation; that the considerations paid in cash or in stock of the Oklahoma Operating Company for the plants, businesses and good wills of the various laundries taken over were as follows:

The Palace Laundry	$48,000.00
The White Swan Laundry	37,000.00
The New State Laundry	35,000.00
King's Laundry	30,000.00
The Model Laundry	12,000.00
The Vail and Vail Laundry	5,000.00
The Crystal Laundry	2,500.00
The Acme Laundry	1,500.00

11 It is shown that the purposes of the consolidation of the eight plants under a single management and control were to curtail expenses of operation and maintain a standard of prices, to take over all the laundries which were consolidated and possibly others if terms might be agreed upon, it being shown that an attempt was made to purchase the Dinks Parrish Laundry, the only remaining laundry in the city anything like the equal size or capacity of the four laundries now operated by defendant, the Oklahoma Operating Company.

E. C. King, President of the Oklahoma Operating Company, in answer to interrogatory of Mr. Patton, Record P. 15:

"Q. Now was it the purpose of the organization in its first inception to take over the laundries that were taken over by the Oklahoma Operating Company?"

"A. Right at the beginning?

"Q. Yes sir.

"A. Why I might say it was the plan, yes sir. That was first figured on. I believe that is correct."

The evidence shows that defendant the Oklahoma Operating Company, through its four plants, does about 75 per cent of the laundry business performed with collection and delivery service in Oklahoma City.

It was also shown by the evidence that an agency of the Oklahoma Operating Company was established at Edmond soon after the organization of the Company, same having been opened there by Mr. Hazzard, an officer of the company, for the purpose of forcing the Edmond Steam Laundry to abandon soliciting business in Oklahoma City, that the prices charged by the agency at Edmond, known as "The Up-to-date Tailor Shop-Laundry Branch", admitted to be an agency of the Oklahoma Operating Company, were materially and substantially lower than the prices of the company charged in Oklahoma City; the prices for shirts and collars at the Edmond agency being 8¢ and 2¢ and the prices charged by the company in Oklahoma City being 10¢ and 3¢; that the prices charged by the Edmond Steam Laundry were about the standard prices, comparing uniformly with the prices of the Oklahoma Operating Company, and that defendant's agency in Edmond was not abandoned until after this proceeding was instituted; that prices of the Penny Laundry charged for shirts and collars prior to the consolidation were 8¢ and 1¢ and that prices of other laundries among those consolidated were lower than the prices now charged by the Oklahoma Operating Company, and that the prices of some of the laundries taken over were slightly higher.

The evidence shows further that there are eight directors of the Oklahoma Operating Company each of whom draws a salary of more than $200.00 per month, six of them drawing $50.00 per week, and two of them being paid $75.00 per week or $325.00 per month. Such salaries appear exorbitant, and may be justified by efficient management of the new company and if fair and reasonable dividends can be earned to stockholders who do not share in these fancy salaries, while the company renders its services to the public at fair and reasonable prices, the Commission would not be disposed to interfere; in fact, information, unauthentic, has come to the Commission since the hearing, that the two seventy-five-dollar-a-week men had been reduced to $50.00 per week.

12 There were many complaints from discharged employees, laundry wagon drivers, for the company, whose services were dispensed with because they refused to execute the form of contract required of them, which contract bound them, among other things, to not engage in the laundry business themselves, or drive wagons for any other laundry for a period of two years from the date of discon-

tinuing in the service of the Company, that is, they should not drive for another company, collecting or delivering laundry in any portion of Oklahoma City bounded by Grand Boulevard. That requirement in the judgment of the Commission is unreasonable. There are reasons as shown by the evidence why drivers should obligate themselves to not collect or deliver laundry for another company, on the same route, or in the same territory covered for the Oklahoma Operating Company, as in many instances the patronage of the particular driver is built up at the expense of the Company, but that is as far as the requirement should go. There is no good reason why they should not be permitted in other territory or other sections of the city than that covered by their route when in the Company's employ.

The Commission holds that the laundry business is such as may be monopolized or one in which there may be a combination in restraining of trade or an illegal combination; that it is by reason of its nature, extent and existence such that the public must use its services, that the consolidation of defendants herein into the defendant the Oklahoma Operating Company has made its business, practices and services of public consequences, and that said company is subject to the provisions of Section 8812 supra, and in all its practices, prices, rates and charges, is subject to be controlled by the State, through this Commission.

It is contended by defendants that because a laundry has nothing to sell they cannot form and maintain a combination in restraint of trade as is contemplated by the Statute, but this Commission has held that the gin business is subject to monopoly in re complaint against Harris-Irby Cotton Company when ginners furnish their services to the public just as do the laundries, (56 Neb. 386) for the reason that they were not manufacturing establishments. The Act defines trusts as combinations of capital, skill or acts by any person or persons to fix the price of any article or commodity of trade, use or merchandise with the intent to prevent others from conducting or carrying on the same business, or preventing competition in insurance or in manufacture, making, constructing, transportation, sale or purchase of merchandise, produce or commodities, etc.

Our Statute includes all the elements of the Nebraska Act and goes further. It includes "any business (which) by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered" etc. Under like provisions the courts of many of the states have held telephone companies to be subject to the Statute and telephone companies are not manufacturing establishments, have no articles or commodities of trade or merchandise to offer for sale to the public, and have nothing but their services to sell or furnish to the public, just as have the laundries.

13 The Commission finds that defendant the Oklahoma Operating Company to be subject to the provisions of Article 1, Chapter 113 of Snyder's Compiled Laws, and that its act of and the method used in the consolidation of eight laundries and one independent agency are violative of the Act, that the extent of its business in Oklahoma City renders it a virtual monop-ly and of public consequence, affecting the community at large as to the prices or rates

charges for its services, and that it is subject to be controlled by the Commission as to its practices, rates and charges.

The Commission further finds that defendant the Oklahoma Operating Company by the consolidation of laundries taken over puts it in position to control the price of laundry services in Oklahoma City, and that after such consolidation it raised prices above those of some laundries charged prior to the consolidation and that an effort was made to take over the Dinks Parrish Laundry, the only remaining laundry of material consequence in the City not embraced in the consolidation, which is now admitted to not be a competitor in prices for the reason that its prices are higher than those of defendant company, it obtaining its patronage on account of the character of its services.

The Commission further finds that the act of defendant, Oklahoma Operating Company, of establishing an agency in the town of Edmond and rendering its services at prices lower than those charged by it in Oklahoma City and lower than those charged by the Edmond Steam Laundry, admitted to be for the purpose of driving the Edmond Steam Laundry away from its patronage in Oklahoma City, makes the purpose of defendant company evident and that such purpose was to control the business and the prices in Oklahoma City. Such methods are not only illegal but are reprehensible and deserving of universal condemnation of the public. Whether or not it was the intention of the company to increase prices above those now charged is not apparent from the evidence, but conceding those prices to be approximately the standard prices for laundry service and conceding them to be reasonable and fair defendant is now in position to increase prices to any figure which it might desire; the Commission is not at this time disposed to disturb the prices now charged by defendant, but may, in the future, consider reductions in its prices, if its earnings, under the management and system of operation, are shown to be such as will warrant it, but defendant should not increase its prices without the approval of its schedule by the Commission.

The Commission finds that the salaries paid the managing officials are higher than those usually paid for the same character of service in other laundries, but is not disposed to disturb them if reasonable and fair dividends can be paid non-salaried stockholders under the character of management and operation now in effect and under rates for its services to the public that are fair and reasonable.

The Commission finds further that a modification of the form of contract with laundry wagon drivers is necessary to the rights of these working men, such form having eliminated the provisions binding such drivers to not drive wagons within the territory embraced within Grand Boulevard, and it is suggested that such form of contract should be altered in such a manner as will conserve the rights of all parties.

14 No order if regarded by the Commission as necessary except such as will require application and proper showing for any proposed increase in prices, before such increases are made and an order will issue accordingly.

It is therefore ordered that defendant, the Oklahoma Operating Company, do not increase its prices over those now charged for any

class of service without having first made application to and secured the permission of the Commission therefor.

This order shall be in full force and effect on and after April 5th, 1913.

CORPORATION COMMISSION.

(Signed) J. E. LOVE,
Chairman.

" A. G. WATSON,
Commissioner.

" GEO. A. HENSHAW,
Commissioner.

[SEAL.]

Attest:
(Signed) J. H. HYDE,
Secretary.

Oklahoma City, March 25, 1913.

15 "EXHIBIT B."

Before the Corporation Commission of the State of Oklahoma.

Cause No. 1633.

In re Proposed Order to OKLAHOMA OPERATING COMPANY, a Corporation.

Motion.

Comes now the Oklahoma Operating Company and moves the Commission to set aside order No. 685 made in this cause on the 5th day of April, 1913, assuming jurisdiction over this company for the following reasons:

1. That this company is not a monop-ly or a combination in restraint of trade, or an illegal combination of any kind within the meaning of section 8235 Revised Laws 1910.

In this connection this defendant shows that it owns and operates in the city of Oklahoma City four steam laundries. That there are at the present time in operation in said city three steam laundries of similar size and capacity to that operated by this defendant, and that in addition to said steam laundries there are a large number of Chinese laundries and hand laundries in operation, and in addition to these hundreds of persons engaged in the laundry business.

2. This defendant further moves the court to set aside said order for the reason that the laundry business is not one to which the anti-trust laws of the State of Oklahoma apply.

3. For the reason that section 8235 of the Revised Laws of 1910, under which the Commission has assumed jurisdiction over said defendant is in conflict with the Constitution of the state of Oklahoma and of the Fourteenth Amendment of the Constitution of the United

States, for the reason that said statute in connection with the other statutes applicable thereto, denies to the defendant any hearing in court to review the reasonableness or justice of an order made pursuant thereto, and imposes such heavy penalties as to amount
16 to the taking of property without due process of law and of the denial to the defendant of the equal protection of the law.

Wherefore this defendant prays that the Commission will fix a day for the hearing of this motion, and upon said day will set aside its order No. 685 heretofore made in said cause.

——— ———,
——— ———.

17 EXHIBIT "C."

Before the Corporation Commission of Oklahoma.

Cause No. 1633, Order No. 1387.

In re Motion of the OKLAHOMA OPERATING COMPANY to Set Aside Order No. 685 of the Corporation Commission.

Order.

By THE COMMISSION:

Motion was filed by the Oklahoma Operating Company to set aside Order No. 685 of the Corporation Commission, issued in the above numbered Cause, on the 25th day of March, 1913, and made effective on and after the 5th day of April, 1913. Hearing was had on said motion before Commissioner Russell on the 22nd day of January 1918, the Oklahoma Operating Company being represented by Judge C. B. Ames, its attorney and by Ben Barnett, its president.

The reasons urged by attorney for the Oklahoma Operating Company for setting aside said Order No. 685 may be summed up briefly as follows:

1. That this company is not a monop-ly or a combination in restraint of trade, within the meaning of Section 8235, Revised Laws of Oklahoma, 1910.

2. That the laundry business is not one to which the Anti-Trust Laws of the State apply.

3. That said Section 8235, Revised Laws of Oklahoma, 1910, is invalid and unconstitutional.

The testimony and evidence under which Order No. 685 was issued was carefully considered by the Commission at the time said Order was issued, and the Commission will not, therefore, review the same at this time. The additional testimony offered by the Oklahoma Operating Company, this hearing, is not sufficiently changed to cause a modification or setting aside of said Order No. 685 or to cause the Commission to believe that its position heretofore taken when said Order was issued was wrong.

At the close of the hearing memorandum brief was filed by attorney for the Operating Company setting forth in some detail the grounds upon which the Company relies in pressing its motion to set

aside said Order No. 685, and citing authorities to support position taken by the said Oklahoma Operating Company. The Commission, after a careful consideration of this brief, finds that most of the questions raised therein were passed upon by the Commission in its said Order No. 685 and it is not convinced by the arguments in said brief or by the authorities cited therein that its position heretofore taken is wrong.

As pointed out in the testimony offered by the Operating Company at this hearing, and in the brief filed by attorney for the Oklahoma Operating Company, application was heretofore filed to in-
18 crease rates and charges on family washing and flat work. This matter was heard on November 19, 1917, under Cause No. 3156 and thereafter on November 21, 1917, an order was issued denying said application for the reason that no testimony was offered to show that the Operating Company was not then making a profit at the rates then being charged. The only evidence introduced was to the effect that prices of materials had increased. The application was dismissed without prejudice and was, therefore, left open for the filing of additional testimony and the making of an order granting the increase in rates, should testimony be offered to show justification for the same.

The Supreme Court of this State, in a well considered and able opinion written by Justice Turner, in the case of Oklahoma Gin Company vs. State, decided July 11, 1916, and reported in 158 Pac. 629, Public Utilities Reports, Annotated, 1916C 22, discussed the law in question herein in reference to its application to cotton gins and ginning of cotton. The Court held that the Commission's Order fixing prices for ginning seed cotton at Chandler, under said laws, was valid.

The Oklahoma Operating Company is not deprived of its right to secure a consideration of Commission's Order No. 685, in the Supreme Court of this State, if the Commission has exceeded its jurisdiction, or has attempted to regulate business to which the Anti-Trust Laws may not be applicable. See Section 20, Article 9, Constitution of Oklahoma.

Wherefore, the premises considered and the Commission being advised, it is, therefore, ordered that the motion of the Oklahoma Operating Company to set aside Commission's Order No. 685 heretofore issued herein on the 25th day of March, 1913, and made effective on the 5th day of April, 1913, shall be overruled and denied.

Done at Oklahoma City, Oklahoma, this the 5th day of March, 1918.

CORPORATION COMMISSION.

———, *Chairman.*

W. D. HUMPHREY, *Commissioner.*

CAMPBELL RUSSELL, *Commissioner.*

Attest:

J. H. HYDE, *Secretary.*

Endorsed: No. 273. In Equity. In the District Court of the United States for the Western District of Oklahoma. Oklahoma Operating Company, a corporation, Plaintiff, vs. J. E. Love, et al., Defendants. Bill of Complaint. Filed April 4, 1918. Arnold C. Dolde, Clerk, by M. V. Haws, Deputy. Ames, Chambers, Lowe & Richardson, Attorneys and Counselors at Law, Oklahoma City, Okla.

19 In the District Court of the United States for the Western District of Oklahoma.

No. 273. Equity.

OKLAHOMA OPERATING COMPANY, Plaintiff,

vs.

J. E. LOVE et al., Defendants.

Now on this 16th day of April, 1918, the above entitled cause came on to be heard on the application of the plaintiff for a temporary injunction, before Honorable William C. Hook, United States Circuit Judge, Honorable Ralph E. Campbell, United States District Judge for the Eastern District of Oklahoma, and Honorable John H. Cotteral, United States District Judge for the Western District of Oklahoma; the plaintiff being represented by its attorney, C. B. Ames, defendants being represented by S. P. Freeling, Attorney General of Oklahoma, and John B. Harrison, Assistant Attorney General. And after considering the evidence and hearing arguments of counsel, the conclusions of the Court were announced orally by Judge Hook, as follows:

"In the matter of the application of the Oklahoma Operating Company against the members of the Oklahoma Corporation Commission for a temporary injunction, the conclusions of the court will be announced briefly.

The proceeding of the Corporation Commission in a case of this kind has two phases, one of which is judicial and the other legislative. That seems to have been the view of the Supreme Court of Oklahoma in the "Cotton Gin" case, and it appears to be quite a logical one. In determining whether the conditions presented give the Commission jurisdiction, it acts in a judicial way. An essential element of valid judicial proceeding is what is called due process of law. It is
20 necessary to the validity of the proceeding. Generally stated, due process of law contemplates notice to the party to be affected and an opportunity to be heard. In this case the question before the Commission at the threshold was whether the Oklahoma Operating Company was a trust or a monopoly, in the sense in which the Commission would have power to prescribe its laundry rates under the act of the legislature which was discussed this morning. That inquiry is a judicial inquiry. If it determines it has jurisdiction, it then proceeds to the consideration of the rates to be fixed for that trust or monopoly.

The first question is, was there due process of law in the judicial

inquiry? Did the law prescribe notice to the Oklahoma Operating Company and give it an opportunity to be heard. Of course, it is essential that the law itself afford due process. It is not sufficient that it be given as a gratuity or concession on the part of the judicial tribunal.

Section 18 of Article 9 of the Constitution of Oklahoma, which relates to the fixing of rates of public service corporations, makes definite provision for notice and for an opportunity to be heard. Section 19, the one immediately following the other, authorized the legislature to confer upon the Commission additional powers to those over public service corporations. The legislature is authorized to confer upon the Corporation Commission power over other businesses. That would be broad enough to include the business of the petitioner in this application. Section 19, however, does not definitely prescribe any procedure, but the conclusion of the Court is that the procedure prescribed in Section 18 automatically applies to cases which the legislature has provided for under the power given in Section 19. That is to say, in inquiring whether any particular company is a
21 trust, combination or monopoly so that it could go ahead and regulate its rates for service to the public, the Corporation Commission would be required to give the notice prescribed in Section 18, and to afford the opportunity to be heard. Now in fact that procedure was followed in this case, and to that extent it was the construction by a tribunal, board or body of a State of its own constitutional and statutory law. Our conclusion is that the petitioner had due process of law in the decision of the judicial question involved.

Then the commission proceeded to consider the matter of rates. That, as has already been observed, is a legislative proceeding. Where rates are prescribed by a legislature or by a board, body or tribunal exercising legislative powers, there must always, at some time, be an opportunity of judicial review, a judicial inquiry into the validity of the rates if complaint is made that they are non-compensatory. In other words, in the jurisprudence of this country no legislative body can prescribe a schedule of rates, put the seal of its approval upon them, and say, regardless of their effect upon the person whose affairs are regulated, that they are conclusive. If the party affected complains that they are non-compensatory and that his property is being taken without due process of law, he has a right to a judicial inquiry of that question. Moreover, it is not competent for the constitution, the legislature or legislative board, body or tribunal so to hamper that inquiry with penalties as to make it a dangerous and risky thing for a person or a corporation to avail himself of the right. That was determined in the Young case and in many other cases.

Now, if it had been complained in this case that the rates prescribed were non-compensatory our conclusion would have been that the right to the judicial review or the judicial inquiry was
22 unduly burdened because the hearing of it is postponed until contempt proceedings are instituted for a violation or series of violations of the order of the Commission, thereby subjecting the complaining party to the danger of a large aggregate of penalties. But in this case it is not contended on the face of the petition that

the rates were non-compensatory. There are some allusions to it, but in a case of this kind the charge must be made much more definitely than it is here.

Suppose, for example, the petitioner had stated that the rates are remunerative and reasonable, yet we want them enjoined. Would a court of equity consider a case of that kind? Yet this case comes to us practically in that way. Nowhere does it appear in plain language and in detail as should be that there is any real complaint against the compensatory or remunerative character of these rates.

Our conclusion is that the application for temporary injunction should be denied.

Endorsed: No. 273. Oklahoma Operating Co. v. J. E. Love, et al. Conclusion of Court on application for temporary injunction. Filed April 16, 1918. Arnold C. Dolde, Clerk, by M. V. Hawe, Deputy.

23 Thereafter on the 16th day of April, A. D. 1918, the following proceedings were had by said court, in said cause, to-wit:

No. 273. Eq.

THE OKLAHOMA OPERATING COMPANY, a Corporation, Plaintiff,

vs.

J. E. LOVE et al., Defendants.

Now on the 16th day of April, 1918, the above entitled cause came on to be heard on the application of the plaintiff for a temporary injunction, before Honorable William C. Hook, United States Circuit Judge, Honorable Ralph E. Campbell, United States District Judge for the Eastern District of Oklahoma, and Honorable John H. Cotteral, United States District Judge for the Western District of Oklahoma; the plaintiff being represented by its attorney, C. B. Ames; defendants being represented by S. P. Freeling, Attorney General of Oklahoma, and John B. Harrison, Assistant Attorney General. After considering the evidence and hearing arguments of counsel, it is by the court

Ordered that said application for a temporary injunction herein be and the same is denied. To which order and ruling of the court the plaintiff excepts.

At this time defendants ask and are granted leave to file a motion to dismiss plaintiff's bill.

Thereupon plaintiff asks and is granted leave to file an amended bill herein within fifteen days from this date.

24 In the District Court of the United States for the Western District of Oklahoma.

In Equity. No. 273.

OKLAHOMA OPERATING COMPANY, a Corporation, Plaintiff,

vs.

J. E. LOVE, W. D. HUMPHREY, and CAMPBELL RUSSELL, Composing the Corporation Commission of the State of Oklahoma, Defendants.

Amended and Supplemental Bill of Complaint.

Comes the plaintiff in the above entitled cause, and leave of court having been heretofore granted filed this amended and supplemental bill of complaint, and for its cause of action against the defendants alleges:

That the plaintiff is a corporation organized under the laws of Oklahoma having its principal place of business in the city of Oklahoma City, and that it is a resident and citizen of the Western District of the State of Oklahoma. That the defendants J. E. Love, W. D. Humphrey and Campbell Russell are all residents and citizens of the State of Oklahoma; the said J. E. Love being a resident and citizen of the Western District of said state, and the said W. D. Humphrey and Campbell Russell being residents and citizens of the Eastern District of said State and that said defendants are the duly elected, qualified and acting members of the Corporation Commission of the State of Oklahoma.

That the matter in controversy in this cause, exclusive of interest and costs exceeds $3,000.

That the plaintiff is engaged in the laundry business in Oklahoma City, Oklahoma, and operates four laundries, known as King's Laundry, the White Swan Laundry, the Palace Laundry and The New State Laundry, all of which are commonly known as steam laundries. That there are in the city of Oklahoma City three steam laundries not owned by or connected with this plaintiff. That this plaintiff
25 does approximately four sevenths of the laundry business of the city of Oklahoma City, which is done by steam laundries, but that it does less than twenty per cent of the total laundry business of said city. That on April 5, 1913, the Corporation Commission of the State of Oklahoma made an order adjudging that this plaintiff was guilty of a violation of the anti-trust laws of the State of Oklahoma, and adjudging that the Commission had jurisdiction over the prices and practices of this plaintiff under section 8235 of the Revised Laws of 1910 (Sec. 8812 Snyder's Compiled Laws). The Commission however held:

"No order is regarded by the Commission as necessary except such as will require application and proper showing for any proposed increase in prices, before such increases are made and an order will issue accordingly.

It is therefore ordered that defendant, the Oklahoma Operating Company, do not increase its prices over those now charged for any class of service without having first made application to and secured the permission of the Commission therefor".

A copy of said order is attached to the original bill of complaint, marked "Exhibit A" and referred to as a part of this amended and supplemental bill of complaint.

At the time said order was made there was no method under the laws of Oklahoma by which the same could be reviewed in any of the courts of the state, there being no appeal allowed to the Supreme Court from that order, and the district courts and all other courts of the state being prohibited from interfering with the orders of the Corporation Commission. In addition to the fact that there was no method of reviewing said order in the courts of the state the effect of said order was merely to affirm the schedule of prices then in effect by the plaintiff, and as it then had no intention of increasing the prices, the said order had no practical effect upon the business of the plaintiff, and therefore resort to this court was then unimportant.

Between the time said order was made however and the present time the prices of substantially all of the commodities needed by the plaintiff in the prosecution of its business have advanced from 50% to 300% as is shown by the following schedule, showing in
26 part the advances in prices under which this plaintiff is now operating:

	1913.	1918.
"Soap per pound	.06⅛	.17½
Acetic Acid per pound	.04	.12
Soda Ash per hundred	1.17	4.00
Starch (corn) per hundred	3.80	7.44
Starch (wheat) per hundred	6.75	9.63
Hydrated Lime per ton	11.80	20.00
Bluing per pound	3.75	15.00
Wrapping paper per hundred	3.65	7.40
Cotton Twine per pound	.18	.58
Cotton duck per yard	.27	.70
Canvas per yard	1.08	2.35
Cotton Padding per pound	1.60	2.85
Laundry lists per thousand	.50	.75
Hay per ton	8.00	25.00
Bran per hundred	.90	2.25
Chops per hundred	1.50	3.45."

On account of the heavy increase in the cost of operating it has become necessary for this plaintiff to increase its prices and in the month of January, 1918, it filed a motion before the Corporation Commission of the State of Oklahoma praying that defendant's order made in April, 1913, be set aside on the ground that this plaintiff is not a monopoly; that the laundry business is not one to which the anti-trust laws of the state apply and that section 8235 of the Revised Laws of 1910 is in violation of the Constitution of the United States.

A copy of said motion is attached to the original bill of complaint,

marked "Exhibit B" and referred to as a part of this amended and supplemental bill of complaint.

On March 5, 1918, the Commission made an order overruling said motion, a copy of which is attached to the original bill of complaint, marked "Exhibit C" and referred to as a part of this amended and supplemental bill of complaint.

27 This plaintiff respectfully shows to the court that the schedule of rates now in force and fixed by the defendants is inadequate to meet the increased cost of operation and leave to this plaintiff a fair return upon its investment. That the value of the property now used by this plaintiff in carrying on its business, was on December 31, 1917, $294,765.70, and that the value of its property was substantially the same during the entire year of 1917 and is yet. That during the first six months of the year 1917 the total revenues of the plaintiff arising out of the operation of its business were $179,520.52, and its operating expenses were $155,438.66, leaving a margin of $24,081.86. That during the last six months of the year 1917, the total revenues of this plaintiff were $196,805.13, and its total operating expenses were $195,896.36, leaving a margin of $908.77. That during the last six months of the year the high prices heretofore set forth were in force and effect and that the supplies the plaintiff had previously bought at the prevailing lower price had been exhausted. That the total profits for the year 1917 arising out of the operation of the plaintiff's business were $24,990.63. That reasonable depreciation charge would be $18,000, leaving the plaintiff approximately $7,000 earnings for the twelve months' period on its entire investment as aforesaid, and that during the last six months of said period its earnings were wholly insufficient to pay depreciation, and consequently plaintiff alleges that it was during said six months' period operating its business at an actual loss. That the books of the plaintiff are not kept so as to show the exact business month by month, and consequently plaintiff is unable to state the exact condition of its business from between the first day of January, 1918, and the first day of April, 1918, but it avers that substantially the same situation exists as that set forth as applicable to the year 1917 and that the schedule of rates allowed by the order of the Corporation Commission is wholly inadequate to yield a reasonable re-

28 turn upon the investment of the plaintiff and that consequently the effect of said rates was and is to take the property of the plaintiff without due process of law, and in violation of the Fourteenth Amendment.

This plaintiff respectfully shows to the court that it cannot resort to the courts of the State of Oklahoma to review either of said orders. That said orders are in fact as it believes unlawful, but that the law provides no method by which the question of their legality can be submitted to the Courts of the State of Oklahoma. That the defendants acting as the Corporation Commission of the State of Oklahoma continue to exercise jurisdiction over this plaintiff under the orders aforesaid pursuant to the provisions of section 8235 of the Revised Laws of 1910, and this plaintiff avers that said section is in violation of the Fourteenth Amendment to the Constitution of the United States in that it deprives this plaintiff of its property without due

process of law, and denies to it the equal protection of the laws. Said section 8235 is as follows:

"Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence or to affect the community at large as to supply, demand or price or rate thereof, or said business is conducted in violation of the first section of this article, said business is a public business, and subject to be controlled by the state by the corporation commission or by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm, or corporation engaged in any public business to render its services and offer its commodities, or either, upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business."

Said section prescribed no procedure, requires no notice and authorizes no appeal. No other provision of the statutes of the state prescribes procedure, requires notice or provides an appeal from any order made in accordance with this section. The plaintiff
29 therefore is bound to obey this order of the Commission or suffer the penalties of contempt. Under section 19 of article 9 of the Constitution and section 1192 of the Revised Laws of 1910 the Commission may punish by imposing a fine for contempt of not to exceed $500 per day.

This plaintiff therefore, without being given a resort to the courts to determine the reasonableness of its prices or the existence of a monopoly is prohibited from increasing its prices under a penalty of $500 per day.

This plaintiff further respectfully shows to the court that it has established a new schedule of prices somewhat higher than that authorized under the aforesaid orders of the Corporation Commission and that such schedule of prices was put into force and effect on the 8th day of April, 1918, since the filing of the original bill of complaint in this cause. That since the hearing of this cause on the application for a temporary injunction complaints have been made to the said defendants as the Corporation Commission of the State of Oklahoma, and that this plaintiff is violating the aforesaid orders of the Corporation Commission, and as plaintiff is informed and believes other complaints will be filed with the said defendants asking that the plaintiff be adjudged in contempt by the Commission, and that the said defendants sitting as the Corporation Commission of the said State will adjudge this plaintiff in contempt and will subject it to the payment of a fine of not exceeding $500 per day as provided by the laws of said state, and since the hearing in this court upon the application of this plaintiff for a temporary injunction the said Corporation Commission has cited this plaintiff to appear before the Corporation Commission on the 10th day of May, 1918, to give the Commission information and testimony relative to the rates and practices of this plaintiff, and this plaintiff alleges upon information and belief that if it does not appear before said Commission, that the said Com-

mission will punish it for contempt, as provided by the laws of Oklahoma.

30 This plaintiff therefore says that the said section 8235 of the Revised Laws is in conflict with the Fourteenth Amendment as aforesaid because it prescribes no method of procedure, because it requires no notice to be given by the Commission and because the effect of it is to deprive this plaintiff of all resort to the courts to test the reasonableness of any order made in accordance with said section, and therefore to deny to it the equal protection of the laws and to take from it its property without due process of law, and that there is no adequate remedy except by a writ of injunction.

Wherefore plaintiff prays for a temporary injunction restraining the defendants from entertaining complaints against the plaintiff for the violation of said orders of the Corporation Commission, from issuing any citation to the plaintiff to show cause why it should not be punished for a violation of said order and from doing any other acts or things to enforce said orders, and plaintiff further prays upon final hearing said temporary injunction may be made permanent.

C. B. AMES,
Attorney for Plaintiff.

AMES, CHAMBERS, LOWE & RICHARDSON,
Of Counsel.

STATE OF OKLAHOMA,
Oklahoma County:

Before the undersigned, a Notary Public in and for said county personally appeared Ben Barnett who being duly sworn says that he is the president of the Oklahoma Operating Company, the above named plaintiff, that he has read the foregoing amended and supplemental bill of complaint, and that the facts therein stated and the averments therein contained are true, except as to averments of law, and as to them he believes them to be true.

BEN BARNETT.

Subscribed and sworn to before me this 29th day of April, 1918.

[SEAL.] EMMA SEBERGER,
Notary Public.

My commission expires January 12, 1921.

31 I hereby acknowledge service of a copy of the foregoing amended and supplemental bill of complaint to have been made on me this 30 day of April, 1918.

S. P. FREELING,
Attorney General of the State of Oklahoma.
JNO. B. HARRISON,
Ass't Att'y Gen'l.

Endorsed: In Equity. No. 273. In the District Court of the United States for the Western District of Oklahoma. Oklahoma

Operating Company, a corporation, Plaintiff, v. J. E. Love, et al., Defendants. Amended and Supplemental Bill of Complaint. Filed May 1, 1918. Arnold C. Dolde, Clerk.

32 In the District Court of the United States for the Western District of Oklahoma.

In Equity. No. 273.

THE OKLAHOMA OPERATING COMPANY, a Corporation, Plaintiff,

vs.

J. E. LOVE, W. D. HUMPHREY, and CAMPBELL RUSSELL, Composing the Corporation Commission of the State of Oklahoma, Defendants.

Motion for Temporary Injunction.

Comes now the Oklahoma Operating Company, a corporation, plaintiff in the above and foregoing proceeding and gives the court to know and be informed that it is engaged in the laundry business in Oklahoma City, Oklahoma, and operates four laundries known as King's Laundry, White Swan Laundry, Palace Laundry, and the New State Laundry, all of which are commonly known as steam laundries; that there are in the city of Oklahoma City, Oklahoma, three steam laundries not owned by or connected with this plaintiff. That this plaintiff does approximately four-sevenths of the laundry business of the city of Oklahoma City, which is done by steam laundries, but that it does less than twenty per cent of the total laundry business of said city. That on April 5, 1913, the Corporation Commission of the State of Oklahoma made an order adjudging that this plaintiff was guilty of a violation of the anti-trust laws of the State of Oklahoma, and adjudging that the Commission had jurisdiction over the prices and practices of this plaintiff under section 8325 of the Revised Laws of 1910 (Sec. 8812 Snyder's Compiled Laws). The Commission, however, held:

"No order is regarded by the Commission as necessary except such as will require application and proper showing for any proposed increase in prices, before such increases are made and an order will issue accordingly.

33 It is therefore ordered that defendant, the Oklahoma Operating Company, do not increase its prices over those now charged for any class of service without having first made application to and secured the permission of the Commission therefor."

A copy of said order is attached to the original bill of complaint, marked "Exhibit A" and referred to as a part of this amended and supplemental bill of complaint.

At the time said order was made there was no method under the laws of Oklahoma by which the same could be reviewed in any of the courts of the State, there being no appeal allowed to the Supreme Court from that order, and the district courts and all other courts

of the state being prohibited from interfering with the orders of the Corporation Commission. In addition to the fact that there was no method of reviewing said order in the courts of the state the effect of said order was merely to affirm the schedule of prices then in effect by the plaintiff, and as it then had no intention of increasing the prices, the said order had no practical effect upon the business of the plaintiff, and therefore resort to this court was then unimportant.

Between the time said order was made, however, and the present time the prices of substantially all of the commodities needed by the plaintiff in the prosecution of its business have advanced from 50% to 300% as is shown by the following schedule, showing in part the advances in prices under which this plaintiff is now operating:

	1913.	1918.
"Soap, per pound	.06⅛	.17½
Acetic Acid, per pound	.04	.12
Soda Ash, per hundred	1.17	4.00
Starch (Corn) per hundred	3.80	7.44
Starch (Wheat) per hundred	6.75	9.63
Hydrated Lime, per ton	11.80	20.00
34 Bluing, per pound	3.75	15.00
Wrapping Paper, per hundred	3.65	7.40
Cotton Twine, per pound	.18	.58
Cotton Duck, per yard	.27	.70
Canvas, per yard	1.08	2.35
Cotton Padding, per pound	1.60	2.85
Laundry Lists, per thousand	.50	.75
Hay, per ton	8.00	25.00
Bran, per hundred	.90	2.25
Chops, per hundred	1.50	3.45"

On account of the heavy increase in the cost of operating, it has become necessary for this plaintiff to increase its prices and in the month of January, 1918, it filed a motion before the Corporation Commission of the State of Oklahoma, praying that defendant's order made in April, 1913, be set aside on the ground that this plaintiff is not a monopoly; that the laundry business is not one to which the anti-trust laws of the state apply and that section 8235 of the Revised Laws of 1910 is in violation of the Constitution of the United States.

A copy of said motion is attached to the original bill of complaint, marked "Exhibit B" and referred to as a part of this amended and supplemental bill of complaint.

On March 3, 1918, the Commission made an order overruling said motion, a copy of which is attached to the original bill of complaint, marked "Exhibit C" and referred to as a part of this amended and supplemental bill of complaint.

This plaintiff respectfully shows to the court that the schedule of rates now in force and fixed by the defendants is inadequate to meet the increased cost of operation and leave to this plaintiff a fair return upon its investment. That the value of the property now

used by this plaintiff in carrying on its business, was on De-
35 cember 31, 1917, $294,765.70, and that the value of its property was substantially the same during the entire year of 1917 and is yet. That during the first six months of the year 1917 the total revenues of the plaintiff arising out of the operation of its business were $179,520.52, and its operating expenses were $155,438.66, leaving a margin of $24,081.86. That during the last six months of the year 1917, the total revenues of this plaintiff were $196,805.13, and its total operating expenses were $195,896.38, leaving a margin of $908.77. That during the last six months of the year the high prices heretofore set forth were in force and effect and that the supplies the plaintiff had previously bought at the prevailing lower price had been exhausted. That the total profits for the year 1917 arising out of the operation of the plaintiff's business were $24,990.66. That a reasonable depreciation charge would be $18,000, leaving the plaintiff approximately $7,000, earnings for the twelve months' period on its entire investment as aforesaid, and that during the last six months of said period its earnings were wholly insufficient to pay depreciation, and consequently plaintiff alleges that it was during said six months' period operating its business at an actual loss. That the books of the plaintiff are not kept so as to show the exact business month by month, and consequently plaintiff is unable to state the exact condition of its business from between the first day of January, 1918, and the first day of April, 1918, but it avers that substantially the same situation exists as that set forth as applicable to the year 1917 and that the schedule of rates allowed by the order of the Corporation Commission is wholly inadequate to yield a reasonable return upon the investment of the plaintiff and that consequently the effect of said rates was and is to take the property of the plaintiff without due process of law, and in violation of the Fourteenth Amendment.

This plaintiff respectfully shows to the court that it cannot resort
to the courts of the State of Oklahoma to review either of
36 said orders. That said orders are in fact as it believes unlawful, but that the law provides no method by which the question of their legality can be submitted to the Courts of the State of Oklahoma. That the defendants acting as the Corporation Commission of the State of Oklahoma continue to exercise jurisdiction over this plaintiff under the orders aforesaid pursuant to the provisions of section 8235 of the Revised Laws of 1910, and this plaintiff avers that said section is in violation of the Fourteenth Amendment to the Constitution of the United States in that it deprives this plaintiff of its property without due process of law, and denies to it the equal protection of the laws. Said section 8235 is as follows:

"Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence or to affect the community at large as to supply, demand or price or rate thereof, or said business is conducted in vio-

lation of the first section of this article, said business is a public business, and subject to be controlled by the State, by the Corporation Commission or by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm, or corporation engaged in any public business to render its services and offer its commodities, or either, upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business."

Said section prescribed no procedure, requires no notice and authorizes no appeal. No other provision of the statutes of the state prescribes procedure, requires notice or provides an appeal from any order made in accordance with this section. The plaintiff, therefore, is bound to obey this order of the Commission or suffer the penalties of contempt. Under section 19 of article 9 of the Constitution and Section 1192 of the Revised Laws of 1910, the Commission may punish by imposing a fine for contempt of not to exceed $500. per day.

37 This plaintiff, further respectfully shows to the court that it has established a new schedule of prices somewhat higher that that authorized under the aforesaid orders of the Corporation Commission and that such schedule of prices was put into force and effect on the 8th day of April, 1918, since the filing of the original bill of complaint in this cause. That since the hearing of this cause on the application for a temporary injunction complaints have been made to the said defendants as the Corporation Commission of the State of Oklahoma, and that this plaintiff is violating the aforesaid orders of the Corporation Commission, and as plaintiff is informed and believes other complaints will be filed with the said defendants asking that the plaintiff be adjudged in contempt by the Commission, and that the said defendants sitting as the Corporation Commission of the said State will adjudge this plaintiff in contempt and will subject it to the payment of a fine of not exceeding $500. per day as provided by the laws of said state, and since the hearing in this court upon the application of this plaintiff for a temporary injunction the said Corporation Commission has cited this plaintiff to appear before the Corporation Commission on the 10th day of May, 1918, to give the Commission information and testimony relative to the rates and practices of this plaintiff, and this plaintiff alleges upon information and belief that if it does not appear before said Commission, that the said Commission will punish it for contempt as provided by the laws of Oklahoma.

This plaintiff therefore says that the said section 8235 of the Revised Laws is in conflict with the Fourteenth Amendment as aforesaid because it prescribes no method of procedure, because it requires no notice to be given by the Commission and because the effect of it is to deprive this plaintiff of all resort to the courts to test the reasonableness of any order made in accordance with said

38 section, and therefore to deny to it the equal protection of the laws and to take from it its property without due process of

law, and that there is no adequate remedy except by a writ of injunction.

Plaintiff further gives the court to know and be informed that since the filing of the bill in this case, and to-wit, on the 26th day of April, 1918, the defendants have cited the plaintiff herein to appear before the Corporation Commission on the 10th day of May, 1918, and to bring with it its books, papers, records and be present with witnesses in order for said defendants to obtain information in regard to the rates and practices now in effect by the plaintiff, and that the said defendants will, unless restrained by this court, proceed to unlawfully assume jurisdiction over the affairs of this plaintiff and divest it of its property and rights without due process of law.

Wherefore, movant prays for a temporary injunction restraining the defendants from entertaining complaints against this plaintiff, from issuing further citations to the plaintiff and from hearing said cause on the 10th day of May, 1918, and that this court set a day for hearing this application and direct notice to be given to the Governor of the State of Oklahoma and the defendants of the time and place of hearing this motion and for such other relief to which plaintiff may be entitled.

AMES, CHAMBERS, LOWE & RICHARDSON,
Attorneys for Plaintiff.

39 STATE OF OKLAHOMA,
County of Oklahoma, ss:

Before me, the undersigned, a notary public in and for said county and state personally appeared Ben Barnett, who being duly sworn, says that he is President of the Oklahoma Operating Company, the above named plaintiff; that he has read the above and foregoing motion and that the facts therein stated and the averments therein contained are true, except as to averments of law, and as to them, he believes them to be true.

(Signed) BEN BURNETT.

Subscribed and sworn to before me this 9th day of May, 1918.

(Signed) EMMA SEBERGER,
Notary Public.

My commission expires Jan. 12, 1921.

[SEAL.]

Filed May 9, 1918. Arnold C. Dolde, Clerk, by Frank T. McCoy, Deputy.

40 In the District Court of the United States for the Western District of Oklahoma.

In Equity. No. 273.

THE OKLAHOMA OPERATING COMPANY, a Corporation, Plaintiff,

vs.

J. E. LOVE et al., Defendants.

The plaintiff having presented its motion for a temporary injunction filed this day in said cause, it is

Ordered, that said motion be set down for hearing, at Oklahoma City, in this district, at 10 o'clock a. m., on Saturday, May 18, 1918, at which time the defendants are cited to appear and show cause why said motion should not be granted. It is further

Ordered that notice hereof be given by the plaintiff to the Governor, and Attorney General of the State of Oklahoma, and the defendants in the said cause, not less than five days before said hearing, by copies of said motion, this order and the amended bill herein, certified by the clerk.

May 10, 1918.

JOHN H. COTTERAL,
District Judge.

Endorsed: Filed May 10, 1918. Arnold C. Dolde, Clerk.

41 In the District Court of the United States for the Western District of the State of Oklahoma.

In Equity. No. 273.

OKLAHOMA OPERATING COMPANY, a Corporation, Plaintiff,

vs.

J. E. LOVE, W. D. HUMPHREY, and CAMPBELL RUSSELL, Composing the Corporation Commission of the State of Oklahoma, Defendants.

Statement of the Evidence.

Upon the hearing of said cause on the 18th day of May, 1918, upon the application of the plaintiff for a temporary injunction the following evidence was offered by the plaintiff.

The amended and supplemental bill, together with the exhibits referred to therein and attached to the original bill was offered as an affidavit and admitted by the court, and the same is referred to here by reference.

The defendants offered as their evidence in said cause the notice and order of the Corporation Commission dated April 26, 1918,

which was admitted by the court and filed in said cause and the same is hereby adopted in full by reference, and the clerk is requested to copy it as a part of this statement of the evidence.

It is agreed by the plaintiff and the defendants that the foregoing statement of the evidence together with the records and papers therein referred to is a sufficient statement, and that the court
42 may approve the same as a true, complete and properly prepared statement of the evidence offered in said hearing.

AMES, CHAMBERS, LOWE & RICHARDSON,
Attorneys for Plaintiff.
S. P. FREELING,
Attorney General,
Attorney for Defendants.

JNO. B. HARRISON,
Ass't Att'y Gen.
PAUL A. WALKER.

The foregoing is approved as a condensed statement of evidence for the purposes of appeal.

Oklahoma City, Oklahoma, May 23, 1918.

JOHN H. COTTERAL,
District Judge.

Endorsed: Filed May 23, 1918. Arnold C. Dolde, Clerk, by Frank T. McCoy, Deputy.

43 The Corporation Commission of Oklahoma.

Cause No. 1633.

In the Matter of Rates and Practices of the OKLAHOMA OPERATING COMPANY.

Notice and Order to Appear Before the Corporation Commission.

To Ben Barnett, President, Oklahoma Operating Company, Oklahoma City, Oklahoma:

Whereas the Corporation Commission of Oklahoma did on the 25th day of March, 1913, issue its Order No. 685, effective on and after the 5th day of April, 1913, requiring the Oklahoma Operating Company to file application with the Commission before increasing rates; and

Whereas said Order No. 685 was based on a finding of the Corporation Commission that the said Oklahoma Operating Company constituted a monopoly; and

Whereas application was made by the Oklahoma Operating Company to increase rates and charges on family washing and flat work, which application was heard on the 19th day of November, 1917, under Cause No. 3156, and was on the 21st day of November, 1917, dismissed without prejudice for the reason that no testimony was

offered to show that the said Operating Company was not operating at a profit or that rates now charged are non compensatory; and

Whereas the said Oklahoma Operating Company, without offering testimony to show that said Order No. 685 is unreasonable or that the rates charged were noncompensatory, did on the 22nd day of January, 1918, present to the Commission a motion to set aside Order No. 685, which motion was by the Commission overruled, and

Whereas the said Oklahoma Operating Company thereafter filed its application in the District Court of the United States for the Western District of Oklahoma for a temporary injunction against the enforcement of said Order No. 685, which application was by
44 the Court denied on the 16th day of April, 1918; and

Whereas the said Oklahoma Operating Company, while the said application for injunction was pending, advanced rates and charges for laundry work in Oklahoma City; and

Whereas complaints have been made by numerous persons against the rates now being charged and now in effect, which rates are alleged by one or more of the complainants to be at least 100 per cent in excess of rates heretofore charged by the said Oklahoma Operating Company; and

Whereas the Corporation Commission desires information as to the rates and practices now in effect by the Oklahoma Operating Company and information as to the cost of performing laundry service in Oklahoma City and losses thereon or profits derived therefrom, and information in general necessary to determine what may be reasonable rates for laundry service in Oklahoma City and reasonable practices in connection with laundry services in said city.

Now, therefore, you are hereby notified to be and appear before the Corporation Commission of Oklahoma at its hearing room, in the State Capitol, on the 10th day of May, 1918, and bring with you such books and records as may be necessary to enable you to give the foregoing information, and present such witnesses and produce such testimony as will enable the Commission to determine the things and facts heretofore set out herein.

In witness whereof, we have hereunto set our hands and caused to be affixed the seal of the said Commission, this 26th day of April, 1918.

CORPORATION COMMISSION OF OKLAHOMA.

____ ____,
Chairman.

____ ____,
Commissioner.

____ ____,
Commissioner.

Attest:

____ ____,
Secretary.

45 Endorsed: No. 273. Oklahoma Operating Co. v. J. E. Love, et al. Filed May 18, 1918. Arnold C. Dolde, Clerk, by Frank T. McCoy, Deputy.

46 Before the Corporation Commission of Oklahoma.

Order No. 1347, Cause No. 3156.

In re Application of THE OKLAHOMA OPERATING COMPANY, of Oklahoma City, for Permission to Advance Rates and Charges for Laundry Work.

Opinion and Order.

This case was heard November 19, 1917.

Applicants filed their petition on September 28, 1917, alleging:

(1) That said applicant is confronted at this time with advance in the cost of supplies.

(2) That on account of advancing cost of living for the public this applicant has been compelled to advance wages of its employees.

(3) That it is imperative that said applicant receive more money for laundry service.

The petition asked for authority from this Commission to increase charges on "family wash" or "rough dry" work from six cents per pound to seven cents per pound, and on all other classes of work ten per cent.

The application states, and the records of the Commission show, that on March 25, 1913, this Commission issued its Order No. 685 in Cause No. 1533, after hearing held in accordance with Proposed Order No. 115, said Order No. 685 reading, in part, as follows:

"It is therefore ordered that Defendant, the Oklahoma Operating Company, do not increase its prices over those now charged for any class of service, without having first made application to and secured the permission of the Commission therefor".

The application also states, and the records of the Commission further show, that on April 14, 1916, this applicant asked for and secured authority to advance the price of laundering shirts from 10 cents to 15 cents. The applicant sets forth that the reasons for asking the advance now sought are more urgent that those supporting the application in 1916 above referred to.

47 Counsel for the applicant made a statement to the Commission declaring the matters alleged in the application and submitted for consideration eight exhibits. Seven of these were laundry price sheets secured from other cities. The eighth was a letter from a supply house advising the applicants that the price of the merchandise referred to therein had advanced while the supply available had been so materially reduced as to make it impossible for this supply house to book orders for supply to cover a period exceeding three months, except that because of certain particular considerations applying to this particular customer, the house could take its order for a period covering six months, providing for deliveries per week 100 per cent greater than called for in the contract expiring.

The letter showed that prices of supplies have advanced materially

during the last year, but there was no evidence to reflect the effect of the advances upon the result of operation of the property of the applicant. Whether the increased cost is of sufficient importance to change the result of operation from a profit to a loss, or to an inadequate return, is not to be determined from the record.

Mr. C. F. Heidbrink, vice-president of the applicant in response to questions by counsel for the state, said that twice during the present year wages of laundry operatives had been advanced, first early in the year as to a part of such operatives who were given an increase of 10 or 12½ per cent, and again about September 1, when there was a general advance of 10 per cent throughout the pay-roll. No information was offered as to what wages were paid prior to either of said advances or what were paid at the present time.

The exhibits offered as a comparison of rates elsewhere with those prevailing in Oklahoma City are interesting chiefly for the fact that they show that present rates for laundering shirts in Oklahoma City are from two to five cents higher than are in effect at any point from which rate sheets were offered, with the exception of the rate charged by the Great Northern Hotel in Chicago. There is no show-
48 ing as to rates prevailing in the general commercial laundry business in Chicago.

The fact that the commodity involved in this hearing is laundry service instead of transportation service, or electric current or gas, or other commodity usually involved in proceedings of this character, does not make the case something other than a rate case, nor justify favorable action on the petition on a record inadequate and fatally deficient as the record in a case involving rates.

The fact that the corporation appearing as applicant in this case does not fall within the law prescribing what shall constitute public utilities, but that the jurisdiction of this Commission rests rather upon the existence of the busines- of the applicant as a virtual monopoly in the community, does not relieve the applicant from supporting its application for advances in rates in the same manner, as far as may reasonably be done, as would be required in support of a similar application offered by a corporation declared by law to be a public utility.

Such an application would have to be supported by positive evidence, from the books and records of the applicant, showing the character and extent of investment involved, the revenues resulting from operation of the property, the amount and nature of all expenditures, and the return received by the applicant upon the operation of its property under rates and charges in effect.

There is nothing in the record in this case by which the Commission can determine the result of operation of the property of this applicant under rates and charges which are sought to be advanced.

Until the applicant is prepared to place before the Commission a record from which a conclusion on this point can be deduced there is no basis for a decision in favor of the applicant, and the application must fail.

It is therefore ordered that the application be denied and the case is dismissed, without prejudice.

49 Done at Oklahoma City, Oklahoma, this 21st day of November, 1917.

CORPORATION COMMISSION OF OKLAHOMA,
J. E. LOVE,
Chairman.
____ ____,
Commissioner.
W. D. HUMPHREY,
Commissioner.

Attest:

[SEAL.] P. E. GLENN,
Act. Secretary.

Endorsed: No. 273—Eq. Oklahoma Operating Co. v. J. E. Love, et al. Exhibit by Defts. ordered filed. Filed April 16, 1918. Arnold C. Dolde, Clerk, by Frank T. McCoy, Deputy.

50 In the District Court of the United States for the Western District of Oklahoma.

No. 273.

OKLAHOMA OPERATING COMPANY, Plaintiff,

vs.

J. E. LOVE et al., Defendants.

Order Denying Temporary Injunction.

This cause came on to be heard on the 18th day of May, 1918, upon the motion for temporary injunction filed in said cause on the 9th day of May, 1918, before Honorable Kimbrough Stone, Circuit Judge, and Honorables Ralph E. Campbell, and John H. Cotteral, district judges, and it appearing to the court that notice of said hearing had been served for more than five days upon the Governor of the State of Oklahoma, and the Attorney General of the State of Oklahoma, and the defendants in said cause, and the plaintiff in said cause appearing by C. B. Ames, its attorney, and the defendants in said cause appearing by Messrs. S. P. Freeling, Attorney General, John B. Harrison, Assistant Attorney General, and Paul Walker, Attorney for the Corporation Commission; and the cause being submitted upon the affidavits, evidence and arguments of counsel, and the court being fully advised in the premises, it is

Ordered, that the application for a temporary injunction be denied, to which order the plaintiff is allowed an exception, and the plain-

tiff thereupon in open court gave notice of an appeal to the Supreme Court of the United States.

KIMBROUGH STONE,
Circuit Judge.
JOHN H. COTTERAL,
District Judge.
RALPH E. CAMPBELL,
District Judge.

Endorsed: Filed May 18, 1918. Arnold C. Dolde, Clerk.

51 In the District Court of the United States for the Western District of Oklahoma.

In Equity. No. 273.

OKLAHOMA OPERATING COMPANY, Plaintiff,

vs.

J. E. LOVE et al., Defendants.

Opinions on Motion for a Temporary Injunction.

Before Stone, Circuit Judge, and Campbell and Cotteral, District Judges.

STONE, *Circuit Judge:*

This is a suit in equity, No. 273, Oklahoma Operating Company against J. E. Love, et al., composing the Corporation Commission of the State of Oklahoma, the present hearing being in the matter of the motion for a temporary injunction.

The determination of the court, to which Judge Campbell dissents, is that the order sought should be denied. If it is not necessary, possibly it is advisable, that there be a statement by the members of the court of the grounds upon which they base their several conclusions. In my own case a brief memorandum statement is as follows:

In the previous hearing in this case it was held that in deciding that this plaintiff was within the orbit of its control, the Commission acted in a judicial capacity and that the due process of law
52 of that action was amply protected by the statutes of Oklahoma. The claim remains that the statute permitting the Commission to fix rates is invalid because it provides no method of notice and procedure before the Commission, and no method of testing the validity of the orders of the Commission by appeal to the courts. It is a controlling rule that a court will not pass upon the validity of a statute unless that question is necessarily involved in a case presented by one who is injured or about to be injured by that law.

In 1913 the Commission declared plaintiff a monopoly affected by a public interest within the meaning of Section 8235 of the laws

of Oklahoma, 1910. That same order declared, in effect, that the rates then established and enforced by plaintiff were reasonable, by ordering that no increase should be made therein without the consent of the Commission. Admittedly, all parties regarded those rates at the time of that order as reasonable and just. Since then conditions have changed. Plaintiff has several times since sought increases in its rates from the Commission with varying success. Its latest attempt being unsuccessful and resulting in the dismissal of its request without prejudice. Defendants claim no evidence was adduced at that last hearing. Plaintiff says evidence of general conditions was introduced, but no evidence as to the effect of those conditions upon the business of plaintiff. So the matter stood when this suit was filed. This suit, as stated by plaintiff, is an action to enjoin the threatened trial and punishment of plaintiff for contempt because of violations of orders of the Commission which plaintiff claims to be void because based upon a statute which is invalid for the reasons above given.

Plaintiff's ground for alleging that such contempt proceed-
53 ing is threatened is that other companies of various sorts have in the past been so punished for violating orders of the Commission. Here, the facts are, that the defendants have not initiated contempt proceedings, are not threatening to do so and are not even ominously silent and inactive. Since the filing of this suit, defendants have, by an order of April 26, 1918, affirmatively shown that, whatever action they may ultimately take, their present object is not punishment, but investigation. That order is for the presentation of proof that the Commission may, quoting from the order, "determine what may be reasonable rates for laundry service in Oklahoma City, and reasonable practices in connection with laundry service in said city." In my judgment we cannot say in advance what order would be made upon such hearing or whether such order would be injurious to plaintiffs. Until an order which is claimed to be injurious becomes an actuality and finality, and its enforcement is attempted or threatened, the plaintiff cannot show itself entitled to challenge the solemn enactment of the state legislature. I think this action is premature and that the preliminary order should be denied.

COTTERAL, *District Judge:*

A former motion for a temporary injunction was heard and denied in this case. Thereafter, the plaintiff asked and obtained leave to amend its bill. By additional averments, complaint is made that the rates of laundry charges as fixed and permitted by the Commission, will prevent it from obtaining adequate return from the conduct of its business. The motion for a temporary injunction has been re-
newed, and it is to be determined whether sufficient ground
54 appears as a justification for such relief.

The question as to the adequacy of the rates to afford just compensation is not now involved before us. If the law is valid on which the power of regulation depends, it is concededly a question for investigation and decision by the trial court. The present controversy arises from the contention of the plaintiff that the law of the state, both constitutional and statutory, is wanting in due process, for

the reason it does not provide for a notice and hearing whereby the reasonableness of plaintiff's charges may be ascertained by the Commission. In other words, it is contended, that Section 8235 of the Revised Laws of 1910, which purports to authorize the Commission to determine that the plaintiff has a monopoly of the laundry business at Oklahoma City, and in that case to impose regulations, fails of constitutional validity because it contains no reference of any hearing or notice, and none is authorized otherwise, and that the only opportunity accorded to the plaintiff for an inquiry into the rates it may charge its customers, is upon hearing for contempt, pursuant to Section 19 of Article 9, of the state constitution, and Article 2 of Chapter 14, of the Revised Laws of 1910, which attaches a penalty of Five Hundred Dollars a day, etc. If the state has furnished no other remedy to the plaintiff, and the plaintiff must encounter the risk of such penalties in the inquiry concerning its charges, then the fact that the Commission may have accorded the plaintiff a hearing, as a matter of gratuity, will not save the law and it is unconstitutional and void. Missouri Pacific Railway Company vs. Tucker, 230 U. S. 340; Wadley Southern Railway Company vs. Georgia, 235 U. S. 651.

55 Upon the former motion, it was decided that Section 18 of Article 9 of the state constitution, in which there is provision for hearing and notice precedent to the action of the Commission, applies to the judicial inquiry as to whether the plaintiff is a trust or monopoly, and therefore subject to regulation by the state, in respect of its charges in the conduct of the laundry business. It was said: "Our conclusion is that the petitioner had due process of law in the decision of the judicial question involved." I adhere to that holding on the present motion, and furthermore, am of the opinion that the power of the state being ample to abolish a monopoly altogether, it has the lesser power to thwart the injurious tendency thereof to oppress the public, by scaling the prices to a fair and reasonable basis.

The further ruling was made that had the complaint been made that the rates prescribed were non-compensatory, the postponement of a judicial inquiry until the event of contempt proceedings would unduly burden that privilege. But the question was only anticipated, and was not necessary to a decision on that motion for an injunction. And now that it is definitely presented after full consideration, I have reached a different conclusion.

Section 18, of Article 9, of the state constitution is quite specific in requiring notice and hearing, precedent to the making of any order or regulation affecting transportation and transmission companies. By Section 19 of Article 9, the Commission may be invested with such additional powers and charged with such other duties, not inconsistent with the constitution, as may be prescribed by law, relating to the control and regulation of corporations, and the making and enforcement of their rates, charges, etc.

56 Section 8235, Revised Laws of 1910, is a legislative enactment within that authority. The powers thus to be conferred on the Commission by the legislature were to be additional and other than those defined, in which hearing and notice were prerequisites to

regulation, and it is not reasonable to say that the purpose was to leave other corporations without the privilege of an antecedent notice and hearing, as accorded in the case of transportation and transmission companies.

To authorize the conferring of additional powers and other duties implies that those pertaining to hearing and notice shall be applicable. Any other construction would infringe the rule of law, that: "A statute must be so construed, if fairly possible, as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." U. S. vs. Jin Fuey Moy, 241 U. S. 394.

It is my present conclusion that the constitution should be construed as requiring notice and hearing in a case where the legislature might authorize the regulation of corporations constituting a virtual monopoly, the same as in the case of transportation and transmission companies, that it is unnecessary to the validity of Section 8235 of the laws of 1910 that hearing and notice be there specifically provided for, and that the Commission was required to grant such notice and hearing to the plaintiff as was done, in the investigation of both the character of the plaintiff and the reasonableness of its charges to patrons. It is therefore not permissible to declare Section 8235 as wanting in due process of law. My conclusion is that
57 the Commission had due authority to investigate the character of plaintiff's business and on finding it to be subject to that section, to regulate the charges which it would make to the public. The pending motion for temporary injunction should therefore be denied.

I am, however, unable to concur in the holding that there is not a sufficient showing in this case of impending penalty for contempt. It is true, as the Supreme Court of the United States has held, an injunction is not authorized unless a party is about to be injured. In this case, in substance, plaintiff is assailing the investigation of rates, and the enforcement of penalties. While no information for contempt has been filed in so many words, and no citation issued, yet it seems to me it must inevitably follow that the penalty for contempt will be meted out if the plaintiff adheres to its present excessive rates, and in my judgment the impending peril is ample to warrant an injunction if the law upon which the injunction is based should be held invalid.

My conclusion is based upon the merits of the motion for an injunction, that is, the existence of the powers on the part of the Commission to regulate the business of the plaintiff on the grounds that it is a virtual monopoly, in the laundry business. As already stated, this ruling does not affect the right of the plaintiff to prosecute this suit for a decree enjoining the rates upon the ground that they are non-compensatory in character. That is always a privilege of plaintiff where it is set out that the rates are non-compensatory. That is, will not yield a fair, or any return. That matter is left to hearing and procedure by the trial court and is not urged at this time. A familiar illustration, of course, of the controversy over rates
58 occurs in the railroad rate cases such as we have recently had in this court. Those cases did not involve the validity of the law which is the matter in controversy here. The validity of the

rates, as stated, on the part of plaintiff, are not being assailed at this time. That question has not been tried out or heard upon this application for an injunction.

I concur in the holding of Judge Stone that the motion for a temporary injunction, that is, this second motion, should be denied.

CAMPBELL, *District Judge:*

The conclusions of my brethren in this case, of course, results of necessity in the denial of this injunction. I have not written anything on the matter and have only had a short time since the argument today to consider the matter further than the consideration given it on the other day when we sat here on the first motion.

I have been unable to agree with my brethren. It seems to me, as suggested by Judge Cotteral, that it is made sufficiently to appear now that the Commission is threatening to enforce the rate practically fixed by its initial order passed in 1913 by contempt proceedings against these laundry companies who now allege that they have put in force a rate in excess of that in force in 1913, and which the order of the Commission at that time provided should not be raised by the laundry companies without first an application for permission to do so made to the Commission. Such permission has not been granted by the Commission. It seems to me that from this showing it may fairly be said that the Commission now threatens to
59 enforce that rate by contempt proceedings.

It is made to appear now in this proceeding by affidavits filed that the rates fixed by the order of 1913 are non-compensatory and confiscatory, and if I understand the situation so far as this hearing is concerned, that is not denied. I assume that for the purpose of this consideration we may take that as established. Then we have a situation where the rate fixed by the Commission's order is non-compensatory and where the Commission is threatening to enforce that rate by contempt proceedings. It seems to me that the situation is very similar to that presented to the Supreme Court in the case of the Missouri Pacific Railway Company vs. Tucker cited by Judge Cotteral, and it seems to me this injunction should be granted.

I might add that the fact that the law, considering the statutory law and the constitution of the state, practically precluding any appeal to the courts from this legislative action by the Commission in fixing the rate, and providing that the only means by which the laundry companies may have the justness of this rate tried is in the contempt proceedings themselves, that those features of the law in my judgment bring the case within the ruling in the case of Missouri Pacific Ry. Co. vs. Tucker, to which I have heretofore referred.

Endorsed: Filed May 18, 1918. Arnold C. Dolde, Clerk.

60 In the District Court of the United States for the Western District of Oklahoma.

No. 273. In Equity.

THE OKLAHOMA OPERATING COMPANY, a Corporation, Plaintiff,

vs.

J. E. LOVE, W. D. HUMPHREY, and CAMPBELL RUSSELL, Composing the Corporation Commission of the State of Oklahoma.

Petition for Appeal.

To the Honorable John H. Cotteral, District Judge:

The above named The Oklahoma Operating Company, a corporation, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 18th day of May, 1918, does hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignment of error filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States sitting at the city of Washington in the District of Columbia, under the rules of such court in such cases made and provided.

And petitioner further prays that the proper order relating to the required security to be required of him be made.

C. B. AMES,
Attorneys for Plaintiff.

Endorsed: Filed May 21, 1918. Arnold C. Dolde, Clerk.

61 In the District Court of the United States for the Western District of Oklahoma.

In Equity. No. 273.

THE OKLAHOMA OPERATING COMPANY, a Corporation, Plaintiff,

vs.

J. E. LOVE, W. D. HUMPHREY, and CAMPBELL RUSSELL, Composing the Corporation Commission of the State of Oklahoma, Defendants.

Assignments of Error.

Comes now the plaintiff in the above entitled cause and files the following assignments of error, upon which it will rely upon its prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 18th day of May, 1918:—

First.

That the United States District Court for the Western District of Oklahoma erred in denying the motion of plaintiff for a temporary restraining order.

Second.

That the United States District Court for the Western District of Oklahoma erred in not granting to this plaintiff on motion heretofore filed a temporary injunction as prayed in said motion.

Wherefore, appellant prays that said decree be reversed and that said District Court of the United States for the Western District of Oklahoma be ordered to enter decree reversing the decision of the lower court and to grant to this plaintiff a temporary injunction.

C. B. AMES,
Attorneys for Plaintiff.

Endorsed: Filed May 21, 1918. Arnold C. Dolde, Clerk.

62 In the District Court of the United States for the Western District of Oklahoma.

In Equity. No. 273.

THE OKLAHOMA OPERATING COMPANY, a Corporation, Plaintiff,

vs.

J. E. LOVE, W. D. HUMPHREY, and CAMPBELL RUSSELL, Composing the Corporation Commission of the State of Oklahoma, Defendants.

Order Allowing Appeal.

On motion and petition of plaintiff, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein, be and the same is hereby allowed; that a certified transcript of the record, testimony, exhibits, appellant's orders and all proceedings be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of $500.00.

Done at Oklahoma City, Oklahoma, this 21" day of May, 1918.

JOHN H. COTTERAL,
Judge of the District Court of the United States for the Western District of Oklahoma.

Endorsed: Filed May 21, 1918. Arnold C. Dolde, Clerk.

63 In the District Court of the United States for the Western District of the State of Oklahoma.

In Equity. No. 273.

THE OKLAHOMA OPERATING COMPANY, a Corporation, Plaintiff,

vs.

J. E. LOVE, W. D. HUMPHREY, and CAMPBELL RUSSELL, Composing the Corporation Commission of the State of Oklahoma, Defendants.

Bond on Appeal.

Know all men by these presents:—That, we the Oklahoma Operating Company as principal, and B. Barnett and R. F. J. Williams, both of Oklahoma City, Okla., as sureties, are held and firmly bound unto J. E. Love, W. D. Humphrey and Campbell Russell, composing the Corporation Commission of the State of Oklahoma, in the sum of $500.00 lawful money of the United States to be paid to them and their respective heirs, administrators and successors to which payment well and truly to be made we bind ourselves and each of us jointly and severally and each of our heirs, executors, administrators and successors by these presents.

Sealed with our seals and dated this 22 day of May, 1918.

Whereas, the above named principal has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment of the District Court of the United States for the Western District of the State of Oklahoma in the above entitled cause;

Now, therefore, the condition of this obligation is such that if the above named The Oklahoma Operating Company, a corporation, shall prosecute its appeal to effect and answer all costs if it fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

64

[SEAL.] OKLAHOMA OPERATING CO.,
By B. BARNETT, *President*,
Principal.

Attest:
R. F. J. WILLIAMS,
Secretary.

B. BARNETT,
R. F. J. WILLIAMS,
Sureties.

STATE OF OKLAHOMA,
County of Oklahoma, ss:

Ben Barnett and R. F. J. Williams of lawful age being first duly sworn upon their oath, each for himself, deposes and says:

That he signed the above and foregoing undertaking as surety; that he is a bona fide resident of Oklahoma County, Oklahoma, and that he is worth Ten Thousand Dollars over and above all his debts, liabilities and exemptions.

B. BARNETT.
R. F. J. WILLIAMS.

Subscribed and sworn to before me this 22nd day of May, 1918.
[SEAL.] EMMA SEBERGER,
Notary Public.

My commission expires Jan. 12, 1921.

Endorsed: Filed May 23, 1918. Arnold C. Dolde, Clerk.

65 In the District Court of the United States for the Western District of the State of Oklahoma.

In Equity. No. 273.

THE OKLAHOMA OPERATING COMPANY, a Corporation, Plaintiff,

vs.

J. E. LOVE, W. D. HUMPHREY, and CAMPBELL RUSSELL, Composing the Corporation Commission of the State of Oklahoma, Defendants.

Præcipe for Transcript of Record on Appeal.

To the Clerk of the above entitled Court:

You are hereby requested to prepare a transcript of the record in the above entitled cause to be filed in the United States Supreme Court and to include in the transcript of record the following:—

First.

Citation and service.

Second.

Original Bill and Exhibits.

Third.

First opinion of the court denying the application for temporary injunction.

Fourth.

First order denying temporary injunction.

Fifth.

Order permitting amended bill to be filed.

Sixth.

Amended bill.

Seventh.

Motion for temporary injunction.

Eighth.

Order fixing date for hearing.

66 Ninth.

Narrative statement of the evidence as filed in said cause by the plaintiff and the papers incorporated therein by reference.

Tenth.

Opinion of each of the three Judges denying the temporary injunction.

Eleventh.

Order denying the injunction.

C. B. AMES,
Attorneys for Plaintiff.

Service of the above and foregoing præcipe acknowledged this 21 day of May, 1918.

S. P. FREELING,
Att'y General;
JNO. B. HARRISON,
Ass't Att'y Gen.,
Attorneys for Defendants.

PAUL A. WALKER.

Endorsed: Filed May 22, 1918. Arnold C. Dolde, Clerk, by Frank T. McCoy, Deputy.

67 In the District Court of the United States for the Western District of the State of Oklahoma.

In Equity. No. 273.

THE OKLAHOMA OPERATING COMPANY, a Corporation, Plaintiff,

vs.

J. E. LOVE, W. D. HUMPHREY, and CAMPBELL RUSSELL, Composing the Corporation Commission of the State of Oklahoma, Defendants.

Waiver of Præcipe by Defendants.

The defendants in said cause hereby agree that the portion of the record requested in the præcipe of the plaintiff comprises all the por-

tions of the record proper to go into the transcript, and waive the ten days allowed them under the rule to file a præcipe on their behalf and consent that the court may approve the same as the record on appeal.

S. P. FREELING,
Attorney General,
Attorney for Defendants.

JNO. B. HARRISON,
Ass't Att'y Gen.
PAUL A. WALKER.

Endorsed: Filed May 22, 1918. Arnold C. Dolde, Clerk, by Frank T. McCoy, Deputy.

68 UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

I, Arnold C. Dolde, Clerk of the District Court of the United States for the Western District of Oklahoma, do hereby certify the above and foregoing to be a full, true and complete transcript of the pleadings, record and proceedings in said court in case No. 273, In Equity, wherein The Oklahoma Operating Company, a corporation, is plaintiff, and J. E. Love, W. D. Humphrey, and Campbell Russell, composing the Corporation Commission of the State of Oklahoma, are defendants, as full, true and complete as the said transcript purports to contain and as called for by the præcipe for transcript of the record above set forth.

I further certify that the original citation is hereto attached and is returned herewith.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at office in the City of Guthrie in said District, this 3rd day of June, A. D., 1918.

[Seal District Court of the United States, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk.

Endorsed on cover: File No. 26,580. W. Oklahoma D. C. U. S. Term No. 494. The Oklahoma Operating Company, appellant, vs. J. E. Love, W. D. Humphrey, and Campbell Russell, composing the Corporation Commission of the State of Oklahoma. Filed June 8th, 1918. File No. 26,580.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

Number 494

THE OKLAHOMA OPERATING COMPANY,
Appellant,

vs.

J. E. LOVE, W. D. HUMPHREY AND CAMPBELL RUSSELL, COMPOSING THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

MOTION TO ADVANCE

Comes now the above named appellant and moves the court to advance said cause and assign it for hearing at the same time as the case of *Oklahoma Gin Company* v. *State of Oklahoma,* Number 185, of the October Term, 1918, and in support of said motion respectfully shows:

The issue involved in this cause is the validity under the Constitution of the United States of

section 8235 of the Revised Laws of 1910. This action was brought by the appellant against the appellees to enjoin them from punishing it for contempt for the violation of an order fixing laundry rates made under section 8235. The cause was submitted on an application for a temporary injunction and heard by three judges, one circuit judge and two district judges. The application was denied by a divided court, and this appeal is prosecuted direct to this court under the expedition act.

One of the issues involved in the case of the *Oklahoma Gin Company versus The State of Oklahoma* is the constitutionality of this same section of the Oklahoma statutes, and the counsel for both of the appellants are the same, and the counsel for the appellees in both cases are the same. Said causes present the same question from a somewhat different angle, and by being argued at the same time, the convenience of the court and both parties will be served.

The proceeding by contempt to punish a violation of an order of the Corporation Commission of the State of Oklahoma may result in very severe penalties and the temporary injunction having

been denied the appellant is now in a position where it must choose between obeying orders of the Commission, which it believes are without authority of law, or subjecting itself to the risk of heavy penalties.

The expedition act requires three judges to sit in a case of this character, and hear it promptly, and provides for an appeal direct to this court, thereby suggesting the propriety of a prompt decision by this court.

C. B. AMES,
Attorney for Appellant.

AMES, CHAMBERS, LOWE & RICHARDSON,
of Counsel.

The appellees above named join in the foregoing motion.

S. P. FREELING,
Attorney General of the State of Oklahoma.

JNO. B. HARRISON,
Ass't. Attorney General.

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In the Supreme Court of the United States

OCTOBER TERM, 1918

The Oklahoma Operating Company, *Appellant*, vs. J. E. Love, W. E. Humphrey and Campbell Russell, Composing the Corporation Commission of Oklahoma, *Appellee.*	No. 494

STATEMENT AND BRIEF OF APPELLANT

This is an appeal from an order of the district court of the United States for the Western District of Oklahoma in which, with three judges sitting, the application of appellant for a temporary injunction was denied. The question involved is the validity of Section 8235 of the Revised Laws of 1910 (Oklahoma), which as construed by the state court confers power upon the Corporation Commission to regulate the prices and practices of

any business which is of public consequence, and which is being conducted in violation of the anti-trust act.

The point of attack is that the effect of the law is to make rates prescribed by the Commission binding, without any method of resort to the courts to test their reasonableness.

The manner in which the question arises can be best understood by a chronological statement of the facts, but at the outset section 8235 should be in the mind of the court. It is as follows:

> "Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence or to affect the community at large as to supply, demand or price or rate thereof, or said business is conducted in violation of the first section of this article, said business is a public business, and subject to be controlled by the state, by the Corporation Commission, or by an action in any district court of the state, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render its services and offer its commodities, or either, upon reasonable terms without discrimination

and adequately to the needs of the public, considering the facilities of said business."

Returning now to a chronological statement of the facts.

On March 25, 1913, the Corporation Commission filed an opinion and order (pages 6 to 10) in which they found that eight laundries in Oklahoma City had organized the Oklahoma Operating Company (the appellant); had transferred to it their plants, taking its stock as compensation; that the purpose of the consolidation was to reduce expenses and maintain prices; that it included all the large laundries of the city, except one; that this consolidation was in violation of the anti-trust law; created a virtual monopoly and subjected it to the control of the Commission. The prices were not found unreasonable, and the Commission concluded by saying:

"No order is regarded by the Commission as necessary except such as will require application and proper showing for any proposed increase in prices, before such increases are made and an order will issue accordingly.

"It is therefore ordered that defendant, the Oklahoma Operating Company, do not increase its prices over those now charged for any class of service without having first made application to and secured the permission of the Commission therefor."

No appeal from this order was allowed by law, and as the order did not affect prices, no resort to the Federal Court was taken. On November 21, 1917, the Corporation Commission filed an opinion and order (30-32) denying an application which had been filed with it by the appellant for authority to increase certain of its prices.

Thereafter the appellant filed a motion with the Commission asking it to set aside its original order assuming jurisdiction over appellant and prohibiting an increase in its prices, because, first, appellant is not a monopoly; second, that the laundry business is not one to which the anti-trust laws apply; and, third, for the reason that Section 8235 of the Revised Laws of 1910 is unconstitutional.

On March 5, 1918, the Commission denied this motion.

The original bill in this cause was thereafter filed in the district court, setting up the prior proceedings before the Commission; averring that there was no remedy under the laws of the state as they prohibited any resort to the courts; alleging that the prices of all the commodities used by the appellant had increased from 50 per cent

to 300 per cent; setting up in detail these commodities and the increase in cost between 1913 and 1918; alleging that it was necessary to increase the prices; that it had established a new and higher schedule of prices; that complaints were about to be filed with the Commission on account of this increase and that upon such complaints the Commission would adjudge the appellant in contempt of the Commission for violation of its orders and subject it to the penalties imposed by statute. The prayer was for a temporary injunction restraining the appellees from entertaining the complaints, from issuing contempt citations and from doing any other acts or things to enforce the orders of the Commission previously described. The contention of the appellant was that the act was invalid because (1) it made a rate final without giving an opportunity for judicial review, and (2) because no notice of the proceeding was required.

This application for a temporary injunction was heard before Circuit Judge Hook, and District Judges Cotteral and Campbell, and by them denied in a memorandum opinion announced by Judge Hook (14 to 16). The Court held that the

proceedings before the Commission involved two phases, one judicial and the other legislative.

That in determining whether the conditions presented gave the Commission jurisdiction, it acted in a judicial capacity, and that in respect of such proceedings process was prescribed because Section 18 of Article 9 of the Constitution applies and requires notice. On the fixing of the rate the court held that this was a legislative proceeding, and that there must always be an opportunity for a judicial review of such a rate. On this aspect of the subject Judge Hook says:

> "Then the Commission proceeded to consider the matter of rates. That, as has already been observed, is a legislative proceeding. Where rates are prescribed by a legislature or by a board, body or tribunal exercising legislative powers, there must always, at some time, be an opportunity of judicial review, a judicial inquiry into the validity of the rates if complaint is made that they are non-compensatory. In other words, in the jurisprudence of this country no legislative body can prescribe a schedule of rates, put the seal of its aproval upon them, and say, regardless of their effect upon the person whose affairs are regulated, that they are conclusive. If the party affected complains that they are non-compensatory, and that his property is being taken without due process of law, he has a right to a judicial inquiry of

that question. Moreover, it is not competent for the constitution, the legislature or legislative board, body or tribunal so to hamper that inquiry wth penalties as to make it a dangerous and risky thing for a person or a corporation to avail himself of the right. That was determined in the Young case and in many other cases.

"Now, if it had been complained in this case that the rates prescribed were non-compensatory, our conclusion would have been that the right to the judicial review or the judicial inquiry was unduly burdened because the hearing of it is postponed until contempt proceedings are instituted for a violation or series of violations of the order of the Commission, thereby subjecting the complaining party to the danger of a large aggregate of penalties. But in this case it is not contended on the face of the petition that the rates were non-compensatory. There are some allusions to it, but in a case of this kind the charge must be made much more definitely than it is here.

"Suppose, for example, the petitioner had stated that the rates are remunerative and reasonable, yet we want them enjoined. Would a court of equity consider a case of that kind? Yet this case comes to us practically in that way. Nowhere does it appear in plain language and in detail as should be that there is any real complaint against the compensatory or remunerative character of these rates.

"Our conclusion is that the application for temporary injunction should be denied."

The appellant thereafter, upon leave of court,

filed an amended bill, which, in addition to the allegations of the original bill, set up facts to bring it within the rule announced by Judge Hook, showing the capital invested, the result of the operations, and that the rate was inadequate; that since the temporary injunction was filed, complaints had been made to the Corporation Commission, and that the appellant had been cited to appear before it to give the Commission information and testimony relative to its rates and practices. A second application for a temporary injunction was made, and this was likewise heard under the expedition act by three judges. At the second hearing Judge Hook was unable to attend and Circuit Judge Stone sat with District Judges Cotteral and Campbell. At the second hearing each of the sitting judges filed an opinion (33, 34 and 37).

Circuit Judge Stone held that the action was prematurely brought, saying (34):

> "Plaintiff's ground for alleging that such contempt proceeding is threatened is that other companies of various sorts have in the past been so punished for violating orders of the Commission. Here, the facts are, that the defendants have not initiated contempt proceedings are not threatening to do so, and are not even ominously silent and inactive. Since the

filing of this suit, defendants have, by an order of April 26, 1918, affirmatively shown that, whatsoever action they may ultimately take, their present object is not punishment, but investigation. That order is for the presentation of proof that the Commission may, quoting from the order, 'determine what may be reasonable rates for laundry service in Oklahoma City, and reasonable practices in connection with laundry service in said city.' In my judgment we cannot say in advance what order would be made upon such hearing or whether such order would be injurious to plaintiffs. Until an order which is claimed to be injurious becomes an actuality and finality, and its enforcement is attempted or threatened, the plaintiff cannot show itself entitled to challenge the solemn enactment of the state legislature."

Judge Stone's conclusion was therefore that the temporary injunction should be denied. In this conclusion, District Judge Cotteral concurred, but for different reasons. Judge Cotteral stated that while at the former hearing it was said that the injunction would have issued if there had been a showing that the rates were non-compensatory; that this question was only anticipated, was not necessary to a decision and that after fuller consideration he had reached a different conclusion, and that the temporary injunction should be denied because the Commission had due authority to investigate the character of the appellant's busi-

ness, and upon finding it subject to Section 8235 to regulate its charges. He disagrees with Judge Stone, however, with reference to the suit being brought, prematurely brought, saying (36):

> "I am, however, unable to concur in the holding that there is not a sufficient showing in this case of impending penalty for contempt. It is true, as the Supreme Court of the United States has held, an injunction is not authorized unless a party is about to be injured. In this case, in substance, plaintiff is assailing the investigation of rates, and the enforcement of penalties. While no information for contempt has been filed in so many words, and no citation issued, yet it seems to me it must inevitably follow that the penalty for contempt will be meted out if the plaintiff adheres to its present excessive rates, and in my judgment the impending peril is ample to warrant an injunction if the law upon which the injunction is based should be held invalid."

He also holds that the appellant had the right to further prosecute its cause of action and try out the question of fact as to the reasonableness of the rate.

Judge Campbell dissented from the conclusion announced by a majority of the court, adhered to the original opinion announced by Judge Hook, agreed with Judge Cotteral that the action was not prematurely brought, and expressed his conclusion as follows:

"The conclusion of my brethren in this case, of course, results of necessity in the denial of this injunction. 'I have not written anything on the matter and have only had a short time since the argument today to consider the matter further than the consideration given it on the other day when we sat here on the first motion.

"I have been unable to agree with my brethren. It seems to me, as suggested by Judge Cotteral, that it is made sufficiently to appear now that the Commission is threatening to enforce the rate practically fixed by its initial order, passed in 1913, by contempt proceedings against these laundry companies who now allege that they have put in force a rate in excess of that in force in 1913, and which the order of the Commission at that time provided should not be raised by the laundry companies without first an application for permission to do so made to the Commission. Such permission has not been granted by the Commission. It seems to me that from this showing it may fairly be said that the Commission now threatens to enforce that rate by contempt proceedings.

"It is made to appear now in this proceeding by affidavits filed that the rates fixed by the order of 1913 are non-compensatory and confiscatory, and if I understand the situation so far as this hearing is concerned, that is not denied. I assume that for the purpose of this consideration we may take that as established. Then we have a situation where the rate fixed by the Commission's order is non-compensatory and where the Commission is threatening to enforce that rate by contempt

proceedings. It seems to me that the cituais very similar to that presented to the Supreme Court in the case of the *Missouri Pacific Railway Company* v. *Tucker,* cited by Judge Cotteral, and it seems to me this injunction should be granted.

"I might add that the fact that the law, considering the statutory law and the constitution of the state, practically precluding any appeal to the courts from this legislative action by the Commission in fixing the rate, and providing that the only means by which the laundry companies may have the justness of this rate tried is in the contempt proceedings themselves, that those features of the law in my judgment, bring the case within the ruling in the case of *Missouri Pacific Ry. Co.* v. *Tucker,* to which I have heretofore referred."

From the order denying the temporary injunction this appeal is prosecuted.

ASSIGNMENT OF ERROR.

The error assigned is that the court erred in denying the motion of appellant for a temporary injunction.

ARGUMENT.

We rely in this case on one proposition, namely, that Section 8235 is invalid because legislative rates fixed pursuant thereto cannot be subjected to judicial review except at the risk of penalties so great and punishments so severe as to amount to a denial of due process of law. In connection with a discussion of this subject, we will desire to further analyze the position of the several judges participating in the trial court.

In Oklahoma it is the settled law that proceedings before the Corporation Commission cannot be reviewed by any other court except the Supreme Court. The Supreme Court reviews these decisions on appeal in cases in which an appeal is provided for. In other cases, there is no review at all. This statement of the law is contained in Section 20 of Article 9 of the constitution, where it is provided:

> "* * * No court of this state (except the Supreme Court, by way of appeals as herein authorized) shall have jurisdiction to review, reverse, correct, or annul any action of the Commission within the scope of its authority, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Commission in the performance of its official duties. * * *"

It is specifically decided that in cases arising under Section 8235 an appeal from the Commis-

sion to the Supreme Court will not lie. Section 8235 of the Revised Laws of 1910 is the same as Section 8812 of the Compiled Laws of 1909, and in the case of *Harris-Irby Cotton Co.* v. *State,* 31 Okla. 603, it is held in a syllabus prepared by the Court as follows:

> "An order made by the Corporation Commission by virtue of Section 8812, Comp. Laws 1909 (Sess. Laws 1907-8, p. 756), requiring a gin to be operated by its owner for the accommodation of the public at a fixed price for ginning cotton, is not appealable to the Supreme Court of the state."

This same rule is repeated in *Shawnee Gas & Elec. Co.* v. *State,* 31 Okla. 505, at page 508, and that is the settled law of Oklahoma.

Under this section, therefore, the Commission determines, first, whether the anti-trust law is violated; second, whether a monopoly exists; third, whether it has jurisdiction over the case; and, if these questions are determined in the affirmative, it then determines what the rates shall be. The defendant who is adjudged guilty and who by reason of his guilt is subjected to the jurisdiction of the Commission, cannot resort to any court of the State of Oklahoma. The doors of the courts are closed in his face by the Constitution and no

appeal to the Supreme Court is provided by law. He is confronted with the alternative of obeying an order, which he thinks is unjust without judicial review, or of wilfully disobeying it. If he obeys it, he is, of course, without remedy. If he disobeys it, he is cited for contempt of the Commission. When so cited he may admit the violation of the rule, but justify the violation by claiming that the Commission made an unreasonable order. This right is provided in Section 19 of Article 9 of the Constitution, which is as follows:

> "In all matters pertaining to the public visitation, regulation, or control of corporations, and within the jurisdiction of the Commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses, and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the Commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging, and by enforcing its own appropriate process, against the delinquent or offending party or company (after it shall have been first duly cited, proceeded against by due process of law before the Commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against the validity, justness, or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such

fines or other penalties as may be prescribed or authorized by this Constitution or by law. The Commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith, or with the assessment of the property of corporations, or the appraisement of their franchises, for taxation, or with the investigation of the subject of taxation generally. Any corporation failing or refusing to obey any valid order or requirement of the Commission, within reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the Commission (proceeding by due process of law as aforesaid) such sum, not exceeding five hundred dollars, as the Commission may deem proper, or such sum, in excess of five hundred dollars, as may be prescribed or authorized by law; and each day's continuance of such failure or refusal, after due service upon such corporation of the order or requirement of the Commission, shall be a separate offense; provided, that should the operation of such order or requirement be suspended pending any appeal therefrom, the period of such suspension shall not be computed against the company in the matter of its liability to fines or penalties."

If upon the hearing the Commission is of the opinion that its previous order was valid, it fines

the offending party not exceeding five hundred dollars a day for each offense. The Oklahoma Operating Company is operating four laundries; has several thousand customers, and the Commission might treat the overcharge of each customer as a separate offense and each day's continuance as an additional offense. This in fact was done in the Oklahoma Gin Company case, which is being submitted at the same time as this one. There, there were three complaints by different customers of the gin and the Commission fined the Oklahoma Gin Company $500 in each one of the three cases.

Section 1194 of the Revised Laws of 1910 authorizes an appeal to the Supreme Court from the order of the Commission in a contempt case. That section is as follows:

> "If the defendant shall fail to appear or file answer on the day mentioned in the citation, such failure to appear or file answer shall be deemed an admission of the truth of each and every material allegation in such affidavit or information, and the Commission may render judgment without further hearing or testimony; or the Commission may in its discretion, require additional evidence before rendering judgment in any case of default. Upon the appearance and filing of answer of the defendant, such appearance may be by plea, demurrer or answer, and when the issue shall have been settled, the Commission

may hear evidence, as to the matters and facts in reference to the alleged violation of the order or requirement, and may continue the hearing from time to time; and the defendant shall be given ample opportunity to introduce proper evidence and be fully heard in the premises. Upon the conclusion of the evidence and arguments of counsel, the Commission shall render judgment, a copy of which shall be delivered to the defendant, and the defendant shall have five days from the receipt of copy of the judgment to file its exceptions thereto, and shall be allowed to appeal from the judgment of the Commission to the Supreme Court, as provided in other cases, upon its filing a bond with the Commission in double the amount of such fine or judgment, with such security as may be required by the Commission. Upon the filing of such bond with the Commission and allowing of the appeal, the same shall operate a suspension of the fine and judgment appealed from."

The order of the Corporation Commission fixing a rate is, of course, a legislative and not a judicial act. *L. & N. Ry. Co.* v. *Garrett*, 231 U. S. 298. A legislative act cannot be made conclusive. The party affected is entitled to a judicial review. *Chicago, etc., Ry. Co.* v. *Minn.*, 134 U. S. 418. Nor can the right of judicial review be so penalized as to amount to a practical denial of the right. *Ex Parte Young*, 209 U. S. 123, 147. See, also, *Mo. Pac. Ry. Co.* v. *Nebr.*, 217 U. S. 196, 207.

The case of *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, is directly in point. There the legislature of Kansas prescribed maximum rates for the transportion of oil, imposing a penalty upon the carrier of $500 as liquidated damages for an overcharge, to be recovered by action in any court of competent jurisdiction. The carrier in defending the action had a right to challenge the reasonableness of the rate. The state court held that in view of this right, as the penalty could not be collected until the reasonableness of the rate was passed on by the court, that the act was valid. This was reversed and, in the opinion it is said (page 347):

> "Primarily it is to be observed that the rates prescribed by the legislature, while presumptively valid, are not conclusively so; that to require the company, in the operation of its road, to give effect to rates which prevent it from obtaining a reasonable return for the service rendered to the public is to deprive it of its property without due process of law; and that whether the prescribed rates are thus in excess of the State's power (see *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission*, 216 U. S. 1, 24-26, and cases cited) is a question which the company is entitled to have determined in appropriate judicial proceedings. *And it also is to be observed that the act of 1905 and other laws of the State, as construed by the state court, afford the company no opportunity for securing a judicial determination of the validity of these*

rates otherwise than as it may do so in a defensive way when charged, in a case like this or in some criminal prosecution, with failing to give effect to them.

"Being a common carrier, the company is not at liberty to accept or decline shipments of oil. It must receive and carry them when offered and must be ready to name to shippers the rate at which that service will be rendered. *If the statutory rates permit a reasonable return they are controlling; if they prevent it they are invalid. But of their obligatory character the company is not the judge. And yet it must choose whether it will give effect to them or no, and then must abide the result of its action. If they be so unreasonably low as to be invalid, it cannot give effect to them without sustaining a serious and irreparable loss; and if effect be not given to them and they be subsequently adjudged lawful, the enforcement of the prescribed liabilities and penalties will likewise entail a most serious loss, for the transactions involved must necessarily be numerous.* In one of the briefs it is said that the intrastate oil shipments on the company's lines in Kansas in a single year are as many as 10,000. Thus it will be perceived that the position of the company, with no right itself to institute a proceeding to determine for itself and all shippers the validity of the legislative rates, is one of exceeding perplexity.

"On the other hand, the interests of shippers and consumers of oil must be considered no less than those of the carrier. Experience teaches that to secure adherence to rates, even when lawfully prescribed, it is essential that

deviations from them be discouraged by adequate liabilities and penalties.

"It is in the light of these considerations that the validity of the provision imposing a liability for liquidated damages in the sum of $500 for every charge in excess of the legislative rates must be tested.

"It will be perceived that this liability is not proportioned to the actual damages. It is not as if double or treble damages were allowed, as often is done, and as we think properly could have been done here. Nor is it as if there would be difficulty in proving or ascertaining the actual damages, thereby furnishing a reason for prescribing a liquidated amount reasonably approximating the probable damages, taking one case with another. *Chicago, Burlington & Quincy R. R. Co.* v. *Cram*, 228 U. S. 70. What the statute does is to authorize a recovery of $500 in every case, whether the shipment be of one barrel, or of ten or twenty-five barrels, or of a tank car, and this, although it is of common knowledge that the possible damages in respect of the charge for carrying any of these from one point in the State to another, could never be more than a small fraction of that sum. In the present case the shipment was of 25 barrels for a distance of 300 miles, and the excess over the legislative rate, $3.02, was less than 1-150 of the authorized recovery.

"The State court, although recognizing that the solution of the problem is not free from difficulty, reached the conclusion that 'so long as the defendant (the carrier) cannot be made to suffer until a competent court has passed upon the justice of the legislative rates, the

guarantees of the Federal Constitution are not infringed.' But that this view fails to recognize the real plight of the carrier is made plain by the following extract from the opinion in *Ex Parte Young*, 209 U. S. 123, 147:

" 'If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rate, this court has held such a law to be unconstitutional. *Chicago, etc., Railway Co.* v. *Minnesota*, 134 U. S. 418. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

" 'It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at least once, for the purpose of testing its validity without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. Ordinarily, a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. *In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are*

high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested, the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful, he must suffer imprisonment and pay fines as provided in these acts, is, in effect to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event.'

"What was said in that case is conclusive of the question here. True, the act then under consideration subjected the officers and agents of the carrier to penalties not found in the act now before us, but, notwithstanding this, we think the liabilities and penalties imposed by the Kansas statute bring it within the controlling principle of that decision. As applied to cases like the present, the imposition of $500 as liquidated damages is not only grossly out of proportion to the possible actual damages, but is so arbitrary and oppressive that its enforcement would be nothing short of the

taking of property without due process of law and therefore in contravention of the Fourteenth Amendment. See *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 111; *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 286."

The case of *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, is also in point. There the Railroad Commission of Georgia passed an order requiring the railway company to desist from a certain discrimination. In that state the railroad company might have instituted a proceeding in the courts to test the validity of the order, but did not do so. Instead it advised the Commission it would decline to obey the order on the ground that it was void. Afterwards a penalty suit was brought by the State against the Railway Company to recover the penalty provided by law of not exceeding $5000. The railroad company defended on the ground that the order of the Commission, and the statute on which it was based, were in violation of the Fourteenth Amendment. From a judgment against it, it prosecuted an appeal to the Supreme Court. After pointing out at page 660 that the party affected has the right to a judicial determination, no matter whether the rate is fixed by the legislature without a hearing or by an administrative Commission made after a hearing, citing cases supporting

the position of the court and referring to a number of other cases, discussing the general subject, the Court, at page 663, say:

> *"These cases do not proceed upon the idea that there is any want of power to prescribe penalties heavy enough to compel obedience to administrative orders, but they are all based upon the fundamental proposition that under the Constitution penalties cannot be collected if they operate to deter an interested party from testing the validity of legislative rates or orders legislative in their nature. Their legality is not apparent on the face of such orders, but depends upon a showing of extrinsic facts. A statute therefore which imposes heavy penalties for violation of commands of an unascertained quality, is in its nature, somewhat akin to an ex post facto law since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must at his own risk pass upon the question. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid."*

After reviewing a number of decisions, the Court then say, at page 666:

> "In the light of this unbroken line of authorities, therefore, a statute like the one here involved (under which penalties of $5,000 a day could be imposed for violating orders of the Commission) would be void if access to the courts to test the constitutional validity of the requirement was denied; or, if the right of review actually given was one of which the carrier could not safely avail itself."

The Court reached the final conclusion that the railroad company was not entitled to the relief sought, but put it on the ground that there was express provision in the Georgia law for reviewing the order in the courts of that state and that the railroad company could have protected itself by that review.

The only reason assigned by the Court for sustaining the Georgia statute is absent from the Oklahoma statute, there being here no right of review under the state law except by way of defense in a proceeding to punish the party affected for contempt of the Commission. The reasoning of these decisions seems inevitably to strike down the statute under consideration.

Before concluding the argument, however, we desire respectfully to suggest our views with ref-

erence to the several opinions announced by the trial judges.

As previously stated, Judges Hook, Cotteral and Campbell denied the relief sought because there was no sufficient showing that the rates were confiscatory. They conceded that the act of the legislature was void for failure to provide a resort to a judicial determination, but held that we had not made a sufficient showing that we were injured by the rates. The appeal is not from that order, but notwithstanding that fact, it may tend to a clearer conception of the question involved to consider this idea. The appellant was not seeking to enjoin the rates, except incidentally. The theory originally presented did not involve an inquiry into the reasonableness of the rates, but the action was brought primarily to enjoin the Commission from punishing the appellant for contempt. If the statute is invalid, the Commission was without power to prescribe rates. The question involved, as we thought, was a question of power and not a reasonable exercise of power. Our theory was that the Commission was without power to prescribe either a reasonable or an unreasonable rate. The Court seemed to entertain the view that if the rate prescribed by the Commission was a reasonable one

that it was immaterial whether it possessed the power to prescribe it or not. If it was a reasonable rate, in other words, the Commission might fine us for contempt for violating it, although the Commission had no power to prescribe it. This was not our view of the law. We thought that if the Commission was powerless to make the rate that it was likewise powerless to enforce it, and this without regard to the justice of the rate. Whether the rate was reasonable or unreasonable, we were threatened with punishment for contempt. We sought to enjoin the Commission from punishing by contempt. We were about to be damaged by the punishment, not by the rate alone. The Court in holding that the Commission was without power to make the rate and yet refusing to enjoin it from punishing a violation of the rate, it seems to us, took inconsistent positions.

We based the original petition upon the decision of this Court in the case of *Missouri Pacific Railway Company* v. *Tucker, supra,* where this Court, without any inquiry into the reasonableness of the rate, held that the statute was invalid because it did not provide for a judicial review except by way of defense to an action for the penalty. This Court did not decide that the rate involved in

that case was an unreasonable rate, but that the legislature was without power to prescribe any rate, reasonable or unreasonable, without at the same time permitting a judicial ascertainment of its reasonableness.

As the facts, however, justified an amendment alleging that the rate was confiscatory, we elected that course instead of appealing at that time. This was the obvious thing for us to do, as the Court had held with us on the question of law involved, and had announced that it would grant the injunction if we alleged injury by the rate.

After making this allegation, the composition of the Court changed, Circuit Judge Stone presiding instead of Circuit Judge Hook. At the last hearing each one of the three judges entertained a different view. Judge Stone thought the action was prematurely brought. Judge Cotteral and Judge Campbell both disagreed with him on this point. Judge Cotteral in the meantime had changed his mind and concluded that the act was valid; that the question involved in the case was the reasonableness of the rate and not the constitutionality of the statute; that the case should be tried on its merits with a full investigation of the question of fact involved and that consequently the temporary

injunction should be denied. Both Judge Stone and Judge Campbell disagreed with Judge Cotteral on this point. Judge Campbell thought that the act was unconstitutional for the reason which we have urged, and therefore dissented. The result is that the injunction was denied by a vote of two to one, but that the majority denied it for different reasons.

If this action was prematurely brought, then it could not be brought at all. The bill alleged that complaints would be filed and that the Commission would adjudge the defendant in contempt of court. The supplemental bill alleged that the proposed new schedule of rates had been established. That since the first hearing, complaints had been made to the Commission; that other complaints would be filed and that the Commission would adjudge the plaintiff in contempt and subject it to the punishment provided by the law. The evidence showed that notice had been served by the Commission on the appellant requiring it to appear and give information relative to its costs and practices, to present its books and records and to produce witnesses. Under these undisputed facts the conclusion is unescapable that it was the purpose of the Commission to enforce its

orders, to insist upon its jurisdiction and to continue the exercise of the power which it claimed under the statute, which we claim is unconstitutional. Its only method of enforcing its orders was by punishment for contempt. Unless it punishes us for contempt, we could ignore its orders at will. Punishment by contempt is the only method prescribed by law for the enforcement of its orders. Notwithstanding this, Judge Stone states that our only ground for alleging that contempt proceedings are threatened is that other companies of various sorts have been punished for violating orders of the Commission. This overlooks the undisputed allegations that in this case complaints had been filed and that the Commission proposed to proceed in contempt. It also overlooks the fact that the Commission was at that very time proceeding to enforce its jurisdiction. He also refers to this very order as showing that their object is investigation, not punishment, and expresses the opinion that "we cannot say in advance what order would be made upon such hearing or whether such order would be injurious to plaintiffs." We had filed an application before the Commission for an increase in rates which had been denied. We had challenged the constitutionality of the statute, and it had been up-

held. We had violated the order of the Commission and the only punishment for this violation was contempt proceedings. The Commission had by the very order which Judge Stone refers to indicated its determination to enforce its jurisdiction. Our claim was that it had no jurisdiction. The relief we sought was protection against contempt proceedings. If the statute is unconstitutional, the Commission was without jurisdiction to make any of the orders which it had made and which it undeniably intended to enforce. Apparently Judge Stone thought that no action would lie until the Commission had demonstrated that it intended to punish us for contempt by the imposition of the fine. If this is true, the action was prematurely brought, but it would follow that it could never be brought at all, because when the punishment for contempt is imposed an appeal lies to the State Supreme Court, and from the State Supreme Court a writ of error would run from this Court. If therefore this action was prematurely brought, then the United States District Court would never find a time when it would have jurisdiction, and consequently the doors of the Federal Court would be closed in the face of those seeking relief against an unconstitutional statute. As against Judge Stone's

opinion on this point, we have the opinion of Judges Hook, Cotteral and Campbell, none of whom thought the action was prematurely brought.

Judge Cotteral's opinion was that the act was valid, and that the question involved was the reasonableness of the rate. That is the question we have debated in this brief. Of the four judges who participated at the two hearings, Judge Cotteral was the only one to express that view.

There are just two ways in which this question can possibly be raised. One of them is by defending the contempt proceedings, appealing to the Supreme Court of the State, and thence coming to this Court by writ of error. That course we have pursued in the Oklahoma Gin Company case, which is submitted at the same time as this case. The other is by seeking an injunction in the United States District Court to prevent the Commission from issuing citations for contempt. That is the course we have pursued in this case. The question therefore in these two cases is brought to this Court in the only two ways which are possible, and we hope that a decision on the merits may be here announced.

On the question of notice, we refer to our brief

in the Oklahoma Gin Co. case, submitted at the same time as this case.

C. B. AMES,
Attorney for Plaintiff in Error.

AMES, CHAMBERS, LOWE & RICHARDSON,
of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 129.

THE OKLAHOMA OPERATING COMPANY,
APPELLANT,

vs.

J. E. LOVE ET AL., APPELLEES.

REPLY BRIEF.

(NOTE.—There is printed as an appendix to this brief section 18 of article IX of the Constitution of Oklahoma. Section 18 was printed as an appendix to the brief in the case of *The Oklahoma Gin Company vs. The State of Oklahoma,* No. 32, but there are typographical errors therein which make it appropriate to reprint this section. As the two cases are being submitted at the same time, the reprint is attached as an appendix to this brief.)

A reply to some of the statements in the brief of the appellees is submitted so that they may not pass unchallenged.

First. At page 5 of the brief of appellees it is sought to distinguish the *Missouri Pacific Railroad Co. vs. Tucker,* 230 U. S., 340, by four statements, each of which is erroneous.

(*a*) It is claimed that the rate involved in this case is a judicial order instead of a legislative rate, as in the *Tucker case.* Not so. A rate applicable to the future is a legislative rate whether enacted by a legislature without a hearing or ordered by a commission after a hearing. *Wadley Southern Railway Co. vs. Georgia,* 235 U. S., 651, 660, 661.

(*b*) It is said that the court in the *Tucker case* found that the rate involved prevented the company from receiving a fair return on its property. This is an error, as the court made no such finding. It is further claimed that in the case at bar no evidence was offered to show that the Operating Company was not receiving a reasonable return upon its property. This is likewise an error, as the verified bill is specific on this point and was used as an affidavit at the hearing.

(*c*) It is stated that in the case at bar no charge in contempt has been intimated against the company. We call attention again to the verified bill,

which alleges that such proceedings will be taken and the allegation is not denied in the record.

(*d*) It is again stated that the case is distinguishable from the *Tucker case,* because no attempt is being here made to impose a fine for contempt. We reply to this by again calling attention to the bill, which alleges that such is intended, and this allegation is not denied. In fact, the assertion in this court of the right of the Corporation Commission to proceed against the Operating Company necessarily involves the purpose to impose fines for contempt, as that is the only way under the laws of Oklahoma by which the commission may enforce its orders.

Second. At pages 6 to 8 of the brief of the appellees it is said that the proceeding here involved was a judicial and not a legislative inquiry. Judge Hook's opinion below is cited in support of that contention. This involves a misconception of Judge Hook's ruling. Judge Hook's ruling is that in the proceeding before the Corporation Commission under section 8235 two questions were involved. First, whether or not the defendant was a monopoly, and, second, in the event this was adjudged in the affirmative, what rates should be prescribed in the conduct of its business. He ruled that the commission in determining the first question acted in a judicial capacity, and that in deter-

mining the second question it acted in a legislative capacity; that sections 18 and 19 of article IX of the constitution should be construed together, and by so doing he held that due process was provided for the judicial question above stated. The effect of this was to get the defendant before the commission in a proper way to determine the legislative question of rates. If, therefore, it be conceded that Judge Hook's conclusion was correct, it of course does not follow that the rate order itself was a judicial order, nor did Judge Hook so hold. He merely held that there was due process involved in the manner by which appellant was brought before the commission in the proceeding to determine whether in the opinion of the commission it could exercise jurisdiction. While it is not vital in determining the case, yet we submit that Judge Hook's construction of sections 18 and 19 was not correct. It will be observed that section 18 relates to transportation and transmission companies. Section 34 of article IX (printed as an exhibit to the brief in the *Oklahoma Gin Company case*) defines transportation and transmission companies in a manner which excludes application of those words to the appellant in this case.

The thought suggested in the brief that because the commission's jurisdiction is grounded on the existence of a monopoly that the rate need not be compensatory is not sound. Finding that the de-

fendant is a monopoly is the ground on which the commission exercised jurisdiction. There is nothing in the statute which supports the thought that the rate can be confiscatory. The fact of monopoly is the basis of jurisdiction. In the exercise of jurisdiction, however, there is nothing to negative the universal principle that rates must be reasonable and that they cannot be fixed so as to confiscate the property involved. Nor does Judge Cotteral intimate a ruling to the contrary, but merely holds that where it has been found that the monopoly exists the injurious tendency thereof to oppress the public may be prevented "by scaling the prices to a fair and reasonable basis."

The reference to the *Garrett case,* 231 U. S., [illegible], at page 8 of the brief, is intended to create the impression that forbidding an appeal does not deny due process of law. That case, however, was one in which there was a failure to provide for an appeal, but there was no statute denying a resort to the courts to restrain a confiscatory rate. This is specifically pointed out at page 311 of the 231st United States, where it is assumed that the courts of the State are open to review the rate in an injunction proceeding and that there was no attempt to close the door of the courts in the face of the railroad company. In the case at bar, however, the constitution itself expressly provides that no court of the State shall enjoin, restrain, or interfere with

the commission in the performance of its official duties. Nor can it be said that the action of the commission in this case under the laws of the State was not its official duty, because the Supreme Court of the State has upheld the statute, thereby adjudging that the commission in this act was performing its official duties. From which it follows, of course, that no State court could restrain it.

It is clear, therefore, that in this case a legislative rate has been fixed, that the courts are barred by the laws of the State from entertaining an appeal from the order or a bill to restrain its enforcement. The only review is at the risk of a fine of $500 a day during the violation of the order. This brings the case squarely within the rule announced by this court in *Missouri Pacific vs. Tucker,* 230 U. S., 340, and *Wadley Southern Railway Co. vs. Georgia,* 235 U. S., 651.

Third. As to the argument that there is no proof that the rates involved in this case are non-compensatory, we content ourselves by referring to the bill.

Fourth. As to the contention that there must be a real danger threatened or impending before an injunction is granted, we again content ourselves by referring to the bill.

C. B. AMES,
Attorney for Appellant.

APPENDIX.

Sec. 18, Art. 9, Constitution of Oklahoma.

The Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission, may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the Commission, within the scope of its authority, shall be unlawful and void. The Commission shall also have the right, at all times, to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements, under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the State, as to the manner in which they are operated, with reference to the security and ac-

commodation of the public, and shall, from time to time, make and enforce such requirements, rules, and regulations as may be necessary to prevent unjust or unreasonable discrimination and extortion by any transportation or transmission company in favor of, or against any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation, transmission, or otherwise, in connection with the public duties of such company. Before the Commission shall prescribe or fix any rate, charge or classification of traffic, and before it shall make any order, rule, regulation, or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation, or requirement, shall first be given, by the Commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before said Commission shall make or prescribe any general order, rule, regulation, or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation, or requirement shall first be published in substance, not less than once a week, for four consecutive weeks, in one or more of the newspapers of general circulation published in the county in which the capital of this State may be located, together with the notice of the time and place, when and where the Commission will hear any objections which may be urged by any person interested, against the pro-

posed order, rule, regulation, or requirement; and every such general order, rule, regulation, or requirement, made by the Commission, shall be published at length, for the time and in the manner above specified, before it shall go into effect, and shall also, so long as it remains in force, be published in each subsequent annual report of the Commission. The authority of the Commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges, and classifications of traffic, for transportation and transmission companies, shall, subject to regulation by law, be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the Legislature to legislate thereon by general laws: *Provided, however,* That nothing in this section shall impair the rights which have heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town or county to prescribe rules, regulations, or rates of charges to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town, or county, so far as such services may be wholly within the limits of the city, town, or county granting the franchise. Upon the request of the parties interested, it shall be the duty of the Commission, as far as possible, to effect, by mediation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons or employees.

Office Supreme Court, U. S.
FILED
JAN 23 1919
JAMES D. MAHER,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. [redacted]129

THE OKLAHOMA OPERATING COMPANY,
APPELLANT,

vs.

J. E. LOVE, W. E. HUMPHREY AND CAMPBELL RUSSELL, COMPOSING THE CORPORATION COMMISSION OF OKLAHOMA, APPELLEE.

STATEMENT AND BRIEF OF APPELLEE.

S. P. FREELING,
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 494.

THE OKLAHOMA OPERATING COMPANY,
APPELLANT,

vs.

J. E. LOVE, W. E. HUMPHREY AND CAMPBELL RUSSELL, COMPOSING THE CORPORATION COMMISSION OF OKLAHOMA, APPELLEE.

STATEMENT AND BRIEF OF APPELLEE.

This is an appeal from an order of the District Court of the Western District of Oklahoma, three judges sitting, denying the application of appellant for a temporary injunction. The chronological statement of appellant is substantially correct, but feeling that it does not portray the entire situation, we will briefly state the acts, orders, and pleadings involved.

I.

The Corporation Commission of Oklahoma, after complaint being made, notice served, answer filed and evidence heard, issued its opinion and order March 25, 1913, effective

April 5, 1913, the essentials of which findings are as follows:

(*a*) That the Oklahoma Operating Company was formed for the purpose of taking over a number of laundries of Oklahoma City, paying for them in stock of the parent corporation; that after the consolidation and merger eight laundry companies were owned by the operating company, four of which were operated and four of which were closed down. That there remained only one other laundry in the city with similar capacity to the ones consolidated, namely, Dinks-Parrish Laundry (p. 7, Rec.), and that this laundry, because of its increased prices for better service, was not a competitor of any of the laundries consolidated (p. 10, Rec.).

(*b*) That an agency of the operating company was established in the town of Edmond, Okla., for the purpose of forcing a competitor there out of business, the agency of the company fixing rates for service lower than at Oklahoma City (p. 8, Rec.).

(*c*) That discharged employees complained because they were released because of their refusal to sign a contract which bound them not to engage in laundry business or drive wagons for any other laundry for a period of two years from the termination of their service with the company, nor to deliver laundry in Oklahoma City for any other laundry.

(*d*) The Commission further found and held that the operating company had placed itself in a position to be controlled by the Commission; that the extent and nature of its business constituted a virtual monopoly of the laundry business in the city of Oklahoma City, and therefore subject to the provisions of section 8235 of the Revised Laws of Oklahoma (pp. 9 and 10, Rec.). The opinion and order of the Commission closed with these words:

> "No order is regarded by the Commission as necessary except such as will require application and proper

showing for any proposed increase in prices, before such increases are made and an order will issue accordingly.

"It is, therefore, ordered that defendant the Oklahoma Operating Company, do not increase its prices over those now charged for any class of service without having first made application to and secured the permission of the Commission therefor." (P. 10, Rec.).

II.

In November, 1917, application was made to the Commission by the company to revoke the above order, which was denied for the reason that no testimony was offered to show its rates to be non-compensatory (p. 13, Rec.). In January, 1918, another motion for the same purpose was presented and for the same reason denied in March, 1918 (pp. 12 and 13, Rec.).

III.

Thereupon a petition was filed praying for an injunction enjoining the Commission from entertaining complaints or from issuing citations to the company to show cause why it should not be punished for contempt. It was not alleged in the petition or any pleading before the Commission that the rates under which it was operating were non-compensatory.

We point out to the court, therefore, that at the time of filing the original petition no allegation in any pleading had ever been made that the rates of the company were not profitable; that no evidence had been introduced to this effect; that the last word of the Commission was to the effect that the matter "was left open for the filing of additional testimony and the making of an order granting the increase of rates should testimony be offered to show justification for same" (p. 13, Rec.).

The application of the company was denied, Judge Hook announcing the opinion of the court, found on page 14 of the record. After the denial of the application the company filed its amended bill of complaint in April, 1918, which will be found on page 17 of the record, and in which, for the first time, the company imperfectly alleged the non-compensatory rates under which it was operating, and which allegation we consider insufficient.

This application was likewise denied by the judges in their opinion beginning on page 33 of the record.

ARGUMENT.

The appellant assigns as error the action of the court in denying the temporary injunction and relies upon one proposition only, that section 8235 of the Revised Laws of Oklahoma is invalid because legislative rates fixed pursuant thereto cannot be subjected to judicial review except at the risk of severe penalties and punishments. The appellant is correct in his statement of the law, that the Supreme Court of Oklahoma reviews decisions upon appeal from the Corporation Commission only in cases where an appeal is provided for. The Supreme Court of Oklahoma held that section 20, art. 9 of the Constitution referred to transportation and transmission companies only, and no appeal was provided for from an order of the Commission in a case such as found in

Harris-Irby Cotton Co. *vs.* State, 31 Oklahoma, 603; 122 Pacific, 163.

The appellant, complaining that the State having failed to provide a forum for judicial review of the rate alleged to have been fixed in this case, says that the statute is unconstitutional and void as violative of the 14th amendment. One or two cases from this court are cited to sustain this position, but we insist that these cases were based on statutes

wholly different from the laws here under review and a state of facts having little in common with the facts of the instant case. The leading case mentioned is Missouri Pacific Railroad Co. *vs.* Tucker, 230 U. S., 340. But this case is not in point with the case now under consideration. In the Tucker case the Legislature of Kansas prescribed a schedule of maximum rates to be charged by common carriers for the transportation between points in the State of petroleum, etc., and also provided that any company which charged more than the maximum thus fixed should be liable to any person injured thereby in the sum of five hundred dollars as liquidated damages, together with a reasonable attorney's fee.

(*a*) It will be observed that this was a legislative rate directed to a common carrier, while the order of the Commission under review is a judicial order directed to a monopoly to regulate its practices and charges.

(*b*) The court found that the legislative rate fixed in this case prevented it from receiving a return on its property, while in the case under review no evidence has ever been offered to show that the operating company is not receiving a reasonable return upon its property, and a reasonable return for the service rendered. Nor, as we will show later, is there any sufficient allegation to this effect.

(*c*) In the Tucker case the State attempted to impose and enforce a fixed amount as liquidated damages for a charge greater than the legislative rate, while in this case the law provides that the Commission may impose a fine for contempt of the Commission in the violation of its orders regulating and controlling monopolies. We point out here that no charge in contempt has been lodged or intimated against this company at any time.

(*d*) In the Tucker case the suit was brought to collect unwarranted, liquidated damages, while in the present case no attempt is being made to impose a fine provided by law for contempt.

The State has power under its Constitution and laws to define monopolies and regulate, punish and prohibit them.

Sec. 45, Art. 9, Constitution of Oklahoma.
Sec. 44, Art. 5, Constitution of Oklahoma.

Defining monopoly, it is provided in section 8220, vol. 2, Rev. Laws of Oklahoma, 1910, that

> "Every act, agreement, contract or combination in form of a trust or otherwise, or conspiracy in restraint of trade or commerce, within this State, which is against public policy, is hereby declared to be illegal."

This action, we contend, was an inquiry as to whether or not the Oklahoma Operating Company was and is a monopoly within the definition above given. This was and is a judicial and not a legislative inquiry, and the State has sufficient power to provide the court and clothe it with power to regulate, punish, or suppress such monopoly if found to exist. Was due process of law provided in this hearing, and did the company avail itself of the procedure thus provided? Due process of law means a notice to the party affected and an opportunity to be heard, and this as a matter of law and not as a matter of grace or concession.

North American Cold Storage Co. *vs.* City of Chicago, 211 U. S., 305;
Barbier *vs.* Connelly, 113 U. S., 27;
Dent *vs.* West Virginia, 129 U. S., 114.

The court below found that the law provided and the Commission accorded due process of law in this judicial inquiry, which was the scope of the hearing in action of the Commission.

This is not a rate case. It was not so intended by the appellant. On page 27 of his brief, he says:

> "The appellant was not seeking to enjoin the rates except incidentally. The theory originally presented did not involve an inquiry into the reasonableness of

> the rates, but the action was brought primarily to enjoin the Commission from punishing the appellant for contempt."

Contempt for what? For violating an order of the Commission in the rightful exercise of its judicial power in attempting to control a monopoly. Several conditions are set out in section 8235, one of which must be found to exist before the Commission has jurisdiction, and the conditions found in this case sufficient to give the Commission jurisdiction was that the Oklahoma Operating Company was a "virtual monopoly," after which finding it was subject to control as to its "practices, prices, rates, and charges." Suppose the Commission had ordered it to cease rendering its services at such a low rate in Edmond, where it had a competitor, as to destroy the competitor?

In one sense that would have been the fixing of a rate, just as much so as in the instant case. Would injunction then have been proper, and would it then be said that that was fixing a rate, or would it not rather be said that it was the local exercise of a power to regulate the prices and practices of a monopoly? We construe this to be the meaning of the language of Judge Hook in the first case:

> "Section 18 of Article 9 of the Constitution of Oklahoma, which relates to the fixing of rates of public service corporations, makes definite provision for notice and for an opportunity to be heard. Section 19, the one immediately following the other, authorized the legislature to confer upon the Commission additional powers to those over public service corporations. The legislature is authorized to confer upon the Corporation Commission power over other businesses. That would be broad enough to include the business of the petitioner in this application. Section 19, however, does not definitely prescribe any procedure, but the conclusion of the court is that the procedure prescribed in section 18 automatically applies to cases which the legislature has provided for under the power given in section 19. That is to say, in inquiring whether any particular company is a trust, com-

> bination or monopoly so that it could go ahead and regulate its rates for service to the public, the Corporation Commission would be required to give the notice prescribed in section 18, and to afford the opportunity to be heard. Now in fact that procedure was followed in this case, and to that extent it was the construction by a tribunal, board or body of a State of its own constitutional and statutory law. Our conclusion is that the petitioner had due process of law in the decision of the judicial question involved."

And Judge Cotteral held the same view and held further that the power of the State:

> "being ample to abolish a monopoly altogether, it has the lesser power to thwart the injurious tendency thereof to oppress the public by scaling the prices to a fair and reasonable basis."

We desire to specifically call the attention of the court to the opinion of Judge Cotteral, found on page 34 of the record, and particularly to that part of the opinion beginning with the third paragraph on page 35, wherein he expresses his view as to the powers of the State in such a case as this.

We refer also to the case of L. & N. Railroad Co. *vs.* Garrett, 231 U. S., 298, where it was said:

> "While a State may permit appeals to the courts from the rate-making orders of its Railroad Commissioners, Prentiss *vs.* Atlantic Coast Line, 211 U. S., 210, failure to provide for such an appeal does not deny the carrier due process of law as guaranteed by the 14th Amendment."

This is a paragraph of the syllabus of that case.

There is No Proof that the Rates of This Company are Noncompensatory, and This Allegation is Insufficient in the Bill.

The attention of the court is respectfully directed to the history of this matter as displayed in the record. Never has

the company made such a statement, by pleading or otherwise, to the Corporation Commission. In the first bill in the district court no such charge was made. But in the amended bill it is weakly attempted. It is stated on page 19 of the record that the business for 1917 was non-compensatory. This was the very time when a hearing was had before the Commission, and when the company refused to make a showing in this respect. And now, in 1918, finding it necessary to make such an allegation it says that its books are not kept in such a manner as to show the exact business month by month, and that it is unable to state the exact conditions between the first of January, 1918, and the first of April, 1918, but contents itself with averring that substantially the same conditions exist as in 1917. We feel that if this appellant would exercise the same diligence in showing the Commission the conditions of its business as it has to suppress truth on the subject, it would have received the benefit of every increase in rates which could have been justified.

"The bill does not show the value of the property employed, the expense of operation or the return which would be permitted under the rates prescribed. L. & N. R. R. Co. vs. Garret, 231 U. S., 298." The above quotation found on page 15 of this opinion.

There Must Be a Real Danger Threatened or Impending Before Injunction Will Be Granted.

This proposition is elementary and it is unnecessary to cite authority. It is not enough to say that because of contempt, proceedings have been instituted in other cases, they will be in this. Not a fact or circumstance will be found in this case that the Commission has threatened to perform one injurious act towards this appellant. The last word from the Commission to the company requested proof so the Commission could determine reasonable rates and reasonable practices in connection with laundry service in Oklahoma City. Who can say what order would be made upon such a hear-

ing? When such an order is made as would injure the company unlawfully, and its enforcement attempted or threatened, then and not until then, will the appellant be entitled to an injunction in this case.

Respectfully submitted,

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